

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

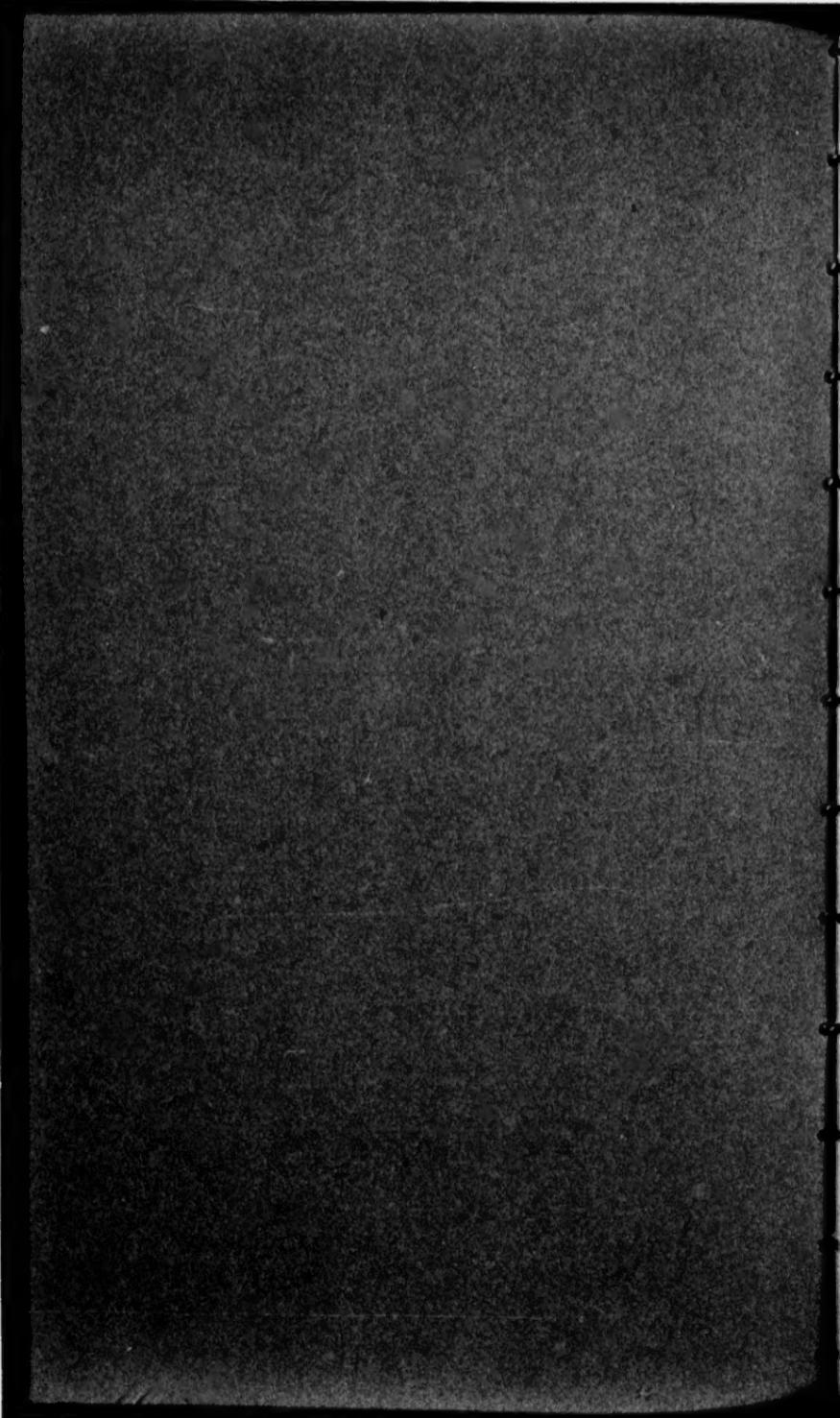
No. [REDACTED] 229

EDWARD R. CUNNINGHAM, PLAINTIFF IN ERROR,

JAMES ERIN COOPER, AND THE CITY OF NEW YORK, DEFENDANTS IN ERROR.

RECORDED IN THE OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES,

ON NOVEMBER 1, 1921.



(27,654)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 321.

EDWARD R. CUNNINGHAM, PLAINTIFF IN ERROR,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, AND
FRANK R. SHINN.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS et al.

Supreme Court of the District of Columbia.

At Law. No. 60111.

EDWARD R. CUNNINGHAM, Plaintiff,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS and FRANK R. SHINN, Appellees.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Declaration, &c.

Filed March 24, 1917.

In the Supreme Court of the District of Columbia.

At Law, No. 60111.

EDWARD R. CUNNINGHAM, Plaintiff,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS and FRANK R. SHINN, Defendants.

First Count. Plaintiff, Edward R. Cunningham, a citizen of the United States and a resident of the District of Columbia, sues under and by virtue of the statutes in such case made and provided, in his own right, the defendants, James Linn Rodgers, as principal upon his certain writing obligatory; Andrew Denny Rodgers, as surety upon the same writing obligatory, and Frank R. Shinn, likewise as surety upon the said writing obligatory, for that: Whereas the said defendant, James Linn Rodgers, was

duly nominated by the President of the United States as Consul General to the United States Consular district of Shanghai, China, and was duly confirmed by the Senate of the United States, and thereafter, to wit: on the 27th day of March, 1905, in the City of Columbus, County of Franklin, State of Ohio, duly executed his certain writing obligatory, as principal, and had executed the same writing obligatory Andrew Denny Rodgers and Frank R. Shinn, as sureties thereunder, which said writing obligatory, on a form prepared by the Department of State, and executed by being duly and properly signed by each of the aforesaid defendants, and sealed with their seals, is now shown to the Court here; whereby the said defendants, and each of them, did thereby acknowledge themselves, their joint and several heirs, executors and administrators, to be jointly and severally held and firmly bound to the United States of America (and the said plaintiff under and by virtue of Sections 1735 and 4110 of the Revised Statutes of the United States, and Section 1697 of the Revised Statutes of the United States, as amended by Act of December 21, 1898—30 Stats. L. 770—together with Section 481 of the Code of Law of the District of Columbia) in the penal sum of \$8,000.00, lawful money of the United States, for the payment of which well and truly to be made, the defendants, and each of them, bound themselves, their heirs, executors and administrators, jointly and severally; which said bond and writing obligatory, after its execution as aforesaid, was delivered to the Department of State, at Washington, District of Columbia, was duly approved March 29, 1905, and immediately thereafter was deposited with the Secretary of the Treasury; and the said James Linn Rodgers was thereupon duly commissioned as such United States Consul General at Shanghai, China, and thereafter entered upon his duties as such Consul General at the port of Shanghai, China.

That said writing obligatory was and is subject to a certain condition therein written to the effect that if the said James Linn Rodgers, one of the above named defendants, a duly commissioned and acting Consul General of the United States, at Shanghai, China, as aforesaid, "shall truly and faithfully discharge the duties of his said office according to law, and shall truly and faithfully account for, pay over, and deliver up all fees, moneys, goods, effects, books, records, papers, and other property which shall come into the hands of the said James Linn Rodgers or into the hands of any other person, to his use as such Consul General, under any law now or hereafter enacted, or by virtue of his office, and that he shall truly and faithfully perform all other duties now or hereafter lawfully imposed upon him as such Consul General. And these presents are subject to this other and further condition, that he, the
3 said James Linn Rodgers, will not, while he holds the said office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as a clerk or other agent for any such person, to, from, or within the port, place or limits of his consular district, directly or indirectly, either in his own name or through the agency of any other person; and, in case he, the said James Linn Rodgers, shall violate the provisions of this condition,

that then the above obligors shall be liable to said obligees to a penalty for the breach of such condition in a sum equal to the amount of the annual compensation of said James Linn Rodgers, which is hereby stipulated, agreed upon and admitted by way of liquidated damages; but that this condition shall not impair or prevent the right of the United States to prosecute said James Linn Rodgers individually, the same as if this bond had not been given; and if the said James Linn Rodgers shall conform to all the above conditions, then this obligation to be void, otherwise to remain in full force" and effect and virtue as by the said writing obligatory and the said condition thereof, as more particularly appears from a copy of the said bond hereto attached, and made part hereof as though at large herein set out.

That thercupon the said defendant, James Linn Rodgers, proceeded to the port of Shanghai, China, and there entered upon his duties as the duly commissioned and qualified Consul General of the United States at that port, and was acting as such at the time of the acts and grievances hereinafter mentioned, referred to, and complained of. Said defendant James Linn Rodgers' consular duties were enjoined upon him by the law laid down by Sections 1709, 1710 and 1711 of the Revised Statutes of the United States, as follows:

"See, 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

First. To take possession of the personal estate left by any citizen of the United States, other than Seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States or, for want of them, of any others at their choice.

Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in
4 their hands they shall deliver them up, being paid their fees, and shall cease their proceedings.

See, 1710. For the information of the representative of the deceased, the consul or vice-consul, in the settlement of his estate, shall

immediately notify his death in one of the gazettes published in the consulate, and also to the Secretary of State, that the same may be notified in the State to which the deceased belonged; and he shall, as soon as may be, transmit to the Secretary of State an inventory of the effects of the deceased, taken as before directed.

See, 1711. When any citizen of the United States, dying abroad, leaves, by any lawful testamentary disposition, special directions for the custody and management, by the consular officer of the port or place where he dies, of the personal property of which he dies possessed in such country, such officer shall, so far as the laws of the country permit, strictly observe such directions. When any such citizen so dying, appoints, by any lawful testamentary disposition, any other person than such officer to take charge of and manage such property, it shall be the duty of the officer, whenever required by the person so appointed, to give his official aid in whatever way may be necessary to facilitate the proceedings of such person in the lawful execution of his trust, and, so far as the laws of the country permit, to protect the property of the deceased from any interference of the local authorities of the country where such citizen dies; and to this end it shall be the duty of such consular officer to place his official seal upon all of the personal property or effects of the deceased, and to break and remove such seal as may be required by such person, and not otherwise."

That for the instruction and guidance of American Consuls in the performance of their duties abroad there was duly and regularly issued to them by the government of the United States, by and through its proper Department and officials, a set of rules and regulations having the force and effect of law under and by virtue of Section 1752 of the Revised Statutes of the United States, which said rules and regulations were and are known as Consular Regulations, 1896, and by Section 409 of said Consular Regulations in full force and effect as law governing the conduct and acts of its consuls at the time of the acts and grievances hereinafter complained of, the duty was further enjoined upon the said defendant, James Linn Rodgers, (who had a copy of these Consular Regulations in his consulate in Shanghai, China, and who was therefore fully apprised of its contents) that:

"A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his country-men deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guard-

ing, collecting, and transmitting them, to be disposed of pursuant to the law of the decedent's State. 7 Op. Att. Gen.

274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

That the duty thus enjoined upon the defendant, James Linn Rodgers, by said Consular Regulations, to the effect that he "has no right, as a consular officer, apart from the provisions of treaty, local law or usage, to administer on the estate, or in that character, to aid any other person in so administering it, without judicial authorization," is not affected, changed, lessened, or increased in any way soever by treaty, as by the treaty of 1844, between the United States and China (Article 25) and since continued in full force and effect between said nations by succeeding treaties, "all questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government; and all controversies occurring in China between citizens of the United States and the subjects of any other Government shall be regulated by the treaties existing between the United States and such Governments, respectively, without interference on the part of China." There is no "local law" of Shanghai, China, as referred to in said Consular Regulations, by reason of the extraterritoriality of the United States in China granted ex vi termini by Article 25 of said treaty; and there are no provisions of local law, therefore, which could interfere with or change in any way sover the meaning and intendment of the above referred to Consular Regulation and law, while the "usage" therein referred to was in compliance with said statutes and Consular Regulations, as is shown fully and particularly by the list of all the entries and accounts of the estates of citizens of the United States who died in the Shanghai consular district of China, sent by the United States Consuls General at Shanghai, China, received in the Office of the Auditor for the State and other Departments and recorded in Book One "Estates of American Citizens" now on file in the Treasury Department, which said list is as certified to July 5, 1906, under the hand and official seal of J. H. Edwards, Assistant Secretary of the Treasury, as follows:

United States of America,
Treasury Department,
July 5, 1906.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of all the entries of the accounts of the estates of citizens of the United States who died in the Shanghai consular district, China, between July 7, 1876 and July 3, 1906, received in the Office of the Auditor for the State and other Departments, from the United States Consulate General at Shanghai, between those dates and recorded in Book One, Estates of American Citizens, now on file in the Department.

6 In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed on the day and year first above written.

(Signed)
[SEAL.]

J. H. EDWARDS,
S. M. G.,
Ass't Secretary of the Treasury.

That from all of the above, whether by statutory enactment, consular regulation, treaty, or usage, the clearly defined legal duty thereby enjoined upon the said defendant, James Linn Rodgers, as said Consul General of Shanghai, China, was that whenever a citizen of the United States, dying within the said consulate, and leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects, said defendant, Consul General as aforesaid, was to take possession of the personal estate left by any such citizen, properly conserve it, and if such citizen died intestate, then to transmit said estate to the Treasury of the United States, to be there holden in trust for the legal claimant under and pursuant to the laws of decedent's State; and if such citizen should die lawfully testate, leaving no legal representative within the said United States consular district of Shanghai, China, then it became and was the duty of the said defendant, James Linn Rodgers, Consul General as aforesaid, to inventory such estate, notify the Secretary of State of the death, discharge local debts and transmit the balance to the Treasury of the United States to be holden in trust for the legal claimant; but if such testator left directions to one other than the aforesaid Consul General James Linn Rodgers for the management or disposition of his estate, then and in that event it became and was the duty of the said James Linn Rodgers, Consul General as aforesaid, when requested by the person so appointed, and only after such person had duly and regularly qualified under the will before a court of proper and competent probate jurisdiction, of decedent's domicile in the United States, to lend his official aid to such person in the performance of the duties imposed upon him by said will; yet, the plaintiff avers that notwithstanding the said official and consular duty thus enjoined by law upon said defendant, James Linn Rodgers, and notwithstanding further the bond and writing obligatory he and his sureties had solemnly entered upon conditioned in the penal sum of \$8,000.00 to insure to said plaintiff that he, said defendant, James Linn Rodgers, "shall truly and faithfully discharge the duties of his said office according to law, and shall truly and faithfully account for, pay over, and deliver up all fees, moneys, goods, effects, books records, papers, and other property which shall come into the hands of the said James Linn Rodgers or into the hands of any other person to his use as such Consul General, under any law now or hereafter enacted, or by virtue of his office, and that he shall truly and faithfully perform all other duties now or hereafter lawfully imposed upon him as such Consul General," he did not truly and faithfully discharge the duties of his said office to plaintiff herein according to law, and did not faithfully account to said plaintiff herein for, or pay over and deliver up to said plaintiff herein "all fees, moneys, goods, effects, books, records, papers and other property" which came into his, said James Linn Rodgers'

7 hands, and did not faithfully perform the acts above set forth which were so required of him by law, and did not faithfully carry out and perform his duties as such Consul General of Shanghai, China; but wholly unmindful of the duty thus enjoined upon him, he, the said James Linn Rodgers, wilfully, wantonly

and grossly violated his duty as said Consul General of the United States for the port of Shanghai, China, according to the terms of the said conditions of his said consular bond and writing obligatory, and caused a breach thereof, and utterly failed, neglected and refused to perform for said plaintiff herein his aforesaid consular duties, to the injury of said plaintiff; in that after the said defendant, James Linn Rodgers, had been duly commissioned, had qualified by giving his aforementioned bond and writing obligatory in the penal sum of \$8,000.00, with himself as principal and Andrew Denny Rodgers and Frank R. Shinn as sureties thereunder, as required by law, and had entered upon the performance of his said consular duties as Consul General of the port of Shanghai, China, there died, to wit, June 10, 1905, while the said defendant, James Linn Rodgers was acting as Consul General at Shanghai, China, and within his said Consular District at said Shanghai, China, one Henry H. Cunningham, aged 67 years, a citizen of the United States, whose legal domicile was in Belfast, County of Waldo, State of Maine, although sojourning and commorant in Shanghai, China, leaving personal property in Shanghai, China, the value of, to wit, 74,704.68 Shanghai tael, equivalent at exchange 70 to \$52,292.80, lawful money of the United States, (leaving no widow, no children, no issue of children, no lineal descendants, no father or mother living, and leaving no heirs at law or next of kin in China, although leaving in Washington City, District of Columbia, as his sole heirs at law and next of kin, a brother of decedent, plaintiff herein, Albert W. Cunningham, another brother of said decedent, then living and domiciled in the State of Maine, but now deceased; two sisters—Mrs. A. C. Mather, now living, and Mrs. Helen Berry, now deceased—both of whom also then lived and were domiciled in the State of Maine, so that under the provisions of Chapter 68 of the Revised Statutes of the State of Maine, then in force, each of decedent Henry H. Cunningham's said brothers and sisters then was legally entitled to distributive one-fourth share of said estate so left at Shanghai, China). That the said Henry H. Cunningham died intestate, although there afterwards was brought to said Consulate in Shanghai, China, on, to wit, June 13, 1905, by one E. H. Dunning, a stranger to the blood of the decedent Henry H. Cunningham, a certain paper writing, which said paper writing is in the words and figures following, as thereafter certified by the defendant James Linn Rodgers:

"Will,

This is the last will of me, Henry H. Cunningham of Belfast Maine U. S. A. and residing in Shanghai, China.

First. I give to my Chinese mistress Tung-choe Tls five thousand (Tls 5,000) to be paid to her in cash in one month from my death, and also everything in my house at Shanghai.

8 Second. I give to E. H. Dunning of Shanghai (Tls 500) Tls five hundred also five shares in Central hotel Lim'd now registered in my name.

When my just debts funeral expenses and the above amounts are paid I give to my sister Augusta now Mrs. A. C. Mather of Rockland Maine U. S. A. the Balance of my property what ever there may be and in case of Mrs. A. C. Mather's death I will that it shall be equally divided between Mrs. A. C. Mather's son Harry Mather of Rockland Maine U. S. A. and my Brother's daughter E. R. Cunningham of Washington D. C. U. S. A.

Should I have any floating property advertise it in the local papers for thirty days and sell it at public auction. Any shares I may have except five (5) shares in Central Stores Lim'd to be sold in Sixty days in the best market.

And I will that my Executor gives no bonds.

And I nominate E. H. Dunning of Shanghai to be the sole Executor of this my last will and revoke all other wills.

HENRY H. CUNNINGHAM.

Shanghai, June 13th 1900.

Witness:

H. W. CHURCHILL,
THOS. F. EARLE."

In the Court of the American Consulate General for the Consular District of Shanghai, China, before James L. Rodgers, Esq., Consul General Acting Judicially.

In Probate.

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

I, Edward H. Dunning, do solemnly swear that I will perform the duties of Executor of the Estate of Henry H. Cunningham, deceased, according to the laws of the United States of America and the laws governing the Consular District of Shanghai, China. So help me God.

EDWARD H. DUNNING.

Subscribed and sworn to before me this 26th day of June, 1905.

JAS. L. RODGERS,
Consul General, Acting Judicially.

I, James L. Rodgers, Consul General of the United States of America, at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai China.

JAS. L. RODGERS,
*Consul General of the United States
of America, at Shanghai, China.*

9 Sworn and subscribed to before me this 16th day of Jan'y
1907.

[Seal U. S. Consulate General, Shanghai, China.]”

M. P. BOYD,
*Vice Consul General of the United States
of America, at Shanghai, China.*

That notwithstanding said paper writing recited that “this is the last will of Henry H. Cunningham, of Belfast, Maine, U. S. A., and residing in Shanghai, China,” and that the very petition itself for the probate of the said alleged will, filed by Edward H. Dunning, June 13, 1905, recognized the fact as to decedent's domicile being in Belfast, Maine, by reciting that “Henry H. Cunningham, a citizen of the United States, died at Shanghai, on or about the 10th day of June, 1905,”—of which fact of domicile the said defendant, James Linn Rodgers, not only was charged by law with legal notice thereof, but had due and proper notice and actual knowledge thereof in fact, as more fully and at large appears from the hereinafter following material parts of the official records of a pretended probate proceeding concerning the estate of the said Henry H. Cunningham, deceased—and further the fact that the consular court of the said defendant, James Linn Rodgers, at the port of Shanghai, China, had but limited and prescribed jurisdictional powers, and not only had no right, power or authority in law to entertain any probate jurisdiction whatsoever to administer upon the estates of decedents dying within his said Shanghai consular district, but as well was the said defendant, James Linn Rodgers, legally charged with notice that the law governing the probate of wills in decedent's domicile in Belfast, Maine, required three credible attesting witnesses to any valid testamentary disposition, as is more particularly shown by the following excerpt from the laws of Maine:

“A person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will.” (Section 1, of Chapter 76, page 661, of the Revised Statutes, of the State of Maine, passed September 1, 1903, and taking effect January 4, 1904. By authority of the Legislature Augusta, Kennebec Journal Print, 1904):

whereas only two witnesses appear to the above referred to paper writing, which invalidated the same and rendered it void and of no effect as the last will and testament of the said Henry H. Cunningham, deceased, even in decedent's own domicile of Belfast, Maine, and resulted in his dying intestate, as aforesaid; he, the said defendant, James Linn Rodgers, not only illegally assumed authority at law and in fact to recognize the said E. H. Dunning as Executor of the Estate of Henry H. Cunningham, deceased, under the said paper writing alleged to be the will of said Cunningham, before the said

Dunning had duly and regularly qualified before a court of proper and competent probate jurisdiction in the United States, and
10 likewise assumed authority to admit said paper writing to probate and record as the last will and testament of the said Henry H. Cunningham, deceased, in violation of his duty as Consul General for Shanghai, China, as aforesaid, but thereafter administered upon said estate, in gross usurpation of a jurisdiction and authority of law directly denied to him by Statute and his own Consular Regulations alike, which said probate proceeding and administration upon said decedent's estate, more particularly and at large appears from the material parts of the record of said proceedings, as the same was certified to by the said defendant, James Linn Rodgers, as follows:

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

Transcript of Record.

Page 287, Probate Record of Shanghai American Consulate-General.

June 13, 1905. Case docketed and petition of Edward H. Dunning filed. Will presented to the Court.
" " " Order made and filed appointing Wednesday, June 21, as time for hearing petition and proving will.
June 21, 1905. Petition heard. E. H. Dunning sworn and testified. Adjourned until such time as subscribing witness can be heard.
" 23 " Thomas F. Earle sworn and testified.
" " " Order made and filed admitting will to probate and appointing E. H. Dunning, Executor without bond.
" 26 " Oath of executor filed and letters testamentary issued.
" 27 " Order for notice to creditors made and filed.
" 30 " Inventory filed.
Aug. 1 " Claims filed and allowed.
Oct. 5 " Order Made for payment of \$35,000 Gold to Legatee Mrs. Mather.
Mar. 14, 1906. Final account filed and approved. Executor ordered to close estate immediately. Executor discharged.

CHAS. A. ENGELBRACHT,
Clerk of Court.

Approved.

J. L. RODGERS,
Consul General.

I, James L. Rodgers, Consul General of the United States of America at Shanghai, China, certify that the foregoing is a true and complete copy of the record in probate of the estate of Henry H. Cun-

ningham, Deceased, as set forth on page 287, Probate Record of American Consulate General at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

11 Sworn and subscribed to before me this 16th of Jan'y 1907.

[SEAL.] M. P. BOYD,
*Vice Consul General of the United States
of America at Shanghai, China."*

"In the Matter of HENRY H. CUNNINGHAM (Deceased).

Duplicate.

Medical Certificate of Death.

I hereby certify that I attended Henry H. Cunningham who died on the 10th day of June 1905 at General Hospital; that I last saw the Deceased on the 10th day of June 1905, and that the cause of death was Myocarditis.

Witness my hand this 14th day of January 1907.

DR. PAULUN.

Age, 67, occupation pilot, nationality American, sex male, single a resident.

I, James L. Rodgers, Consul General of the United States of America at Shanghai, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America, Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y 1907.

M. P. BOYD,
*Vice Consul General of the United States
of America, Shanghai, China."*

"In the Court of the American Consulate General for the Consular District of Shanghai, China, Before James L. Rodgers, Esq., Consul General, Acting Judicially.

In Probate.

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

The petition of E. H. Dunning of Shanghai, respectfully shows that he is a citizen of the United States residing at Shanghai, China.

That Henry H. Cunningham, a citizen of the United States died at Shanghai on or about the 10th day of June, 1905, leaving a last will and testament, which provided for the appointment of your petitioner as executor thereof, and said will is hereby presented to the said Court.

That there are no heirs or relatives of the said deceased within the jurisdiction of this Court.

12 That the said deceased left an estate within the jurisdiction of this Court consisting of personal property to the value of Tls. 50,000.

Wherefore your petitioner prays that a day may be appointed for the hearing this petition and for the proof of said will; that due notice may be given according to law; that upon said hearing your petitioner may be appointed Executor of said last will and testament and that Letters of Administration may be issued to him and for such other and further orders as may be just.

EDWARD H. DUNNING.

Subscribed and sworn to before me this 13th day of June, 1905.

CHAS. A. ENGELBRACHT,
Clerk of the Consular Court, Shanghai, China.

I, James L. Rodgers, Consul General of the United States of America at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General, at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y, 1907.

M. P. BOYD,
*Vice Consul General of the United States
of America at Shanghai, China."*

"In the Court of the American Consulate General for the Consular District of Shanghai, China, Before James L. Rodgers, Esq., Consul General, Acting Judicially.

In Probate.

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

A document purporting to be the last will and testament of Henry H. Cunningham, deceased, having been presented to this Court by Edward H. Dunning, and petition having been made by the said Edward H. Dunning asking for the probate thereof and for the issuance of Letters Testamentary thereon.

It is hereby ordered that Wednesday the 21st day of June, 1905, at 10 o'clock in the forenoon of said day at the courtroom of the above

named Court be and the same hereby is appointed the time and place for proving said will, and hearing said petition, when and where any person interested may appear and contest the same and may file objections in writing to the granting of Letters Testamentary thereon.

It is further ordered that notice be given thereof by publication in the Shanghai Mercury, The North China Daily News and The Shanghai Times for six issues previous to said hearing and 13 and that a notice be posted on the bulletin board at the American Consulate General at Shanghai.

By the Court:—

JAS. L. RODGERS,
Judge.

Dated June 13, 1905.

[L. S.]

I, James L. Rodgers, Consul General of the United States of America at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y, 1907.

M. P. BOYD,

*Vice Consul General of the United States
of America at Shanghai, China.*

"In the United States Court for the Consular District of
Shanghai, China."

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

The petition of Edward H. Dunning heretofore filed, praying for admission of a certain document filed in this Court, purporting to be the Last Will and Testament of Henry H. Cunningham, deceased, and that Letters Testamentary be issued to said petitioner, and for that purpose a time be appointed by the Court, this day regularly coming on to be heard, and due proof, being made to the satisfaction of this Court that notice had been given of the time appointed for proving said Will, and for hearing said petition, and that citations have been issued and served as required by the previous order of this Court, and it, appearing to this Court that notice had been given according to law to all parties interested, and after examining said petitioner and Thomas F. Earle, one of the subscribing witnesses to said Will produced in behalf of said Petitioner, whose testimony has been reduced to writing and filed, from which it appears that said document is the Last Will and Testament of the said Henry H. Cunningham, deceased, that it was executed in all

particulars as required by law, and that the said testator at the time of the execution of the same was of sound and disposing mind, and not under restraint or fraudulent misrepresentation, that the said Henry H. Cunningham, died on or about the tenth day of June, A. D. 1905 being a resident of Shanghai and having personal estate valued at seventy-five thousand dollars Mexican, that said estate for
14 and in respect of which the probate of said Will is applied for as aforesaid, does not exceed in value seventy-five thousand dollars Mexican or thereabout, and no objection being made to the admission of said Will to probate, it is ordered that Letters Testamentary of the estate of said Henry H. Cunningham, deceased, be issued to the said petitioner Edward H. Dunning, upon his taking the oath as required by law. Dated June 23, 1905.

JAS. L. RODGERS,

[L. S.]

Consul General, Acting Judicially.

I, James L. Rodgers, Consul General of the United States of America, at Shanghai China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai, China.

JAS. L. RODGERS,

*Consul General of the United States
of America, at Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y, 1907.

M. P. BOYD,

*Vice Consul General of the United States
of America, at Shanghai, China."*

"In the Court of the American Consulate-General for the Consular District of Shanghai, China, before James L. Rodgers, Consul General, Acting Judicially.

In Probate.

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

To Edward H. Dunning, Esq:

Whereas Henry H. Cunningham, a citizen of the United States, died on the tenth day of June, 1905, having duly made and executed his last will and testament, a copy of which is hereby annexed, and said last will and testament having been duly admitted to probate by the Court of the American Consulate General at Shanghai, China, on the twenty-third day of June, 1905;

And whereas the said Henry H. Cunningham, deceased, at the time of his death was a resident of Shanghai by the means whereof the proving of said will and the ordering and granting administration of the estate whereof the said testator died possessed within the said Consular jurisdiction and also the auditing, allowing and

sicharging the accounts thereof doth appertain to the said Court, and I being desirous that said will should be observed and performed, and that the said estate should be well and faithfully administered, applied and disposed of, do grant unto you, Edward H. Dunning, full power and authority, by these presents, to administer and faithfully to dispose of all and singular, the said estate, and to

ask for, demand, and receive the debts which unto the said
15 testator while living and at the time of his death did belong,

and to pay the debts which the said testator did owe, as far as possible as such assets will thereto extend and the law require. And I do by these presents, constitute and appoint you Executor of all and singular, the goods, chattels, credits and property of the said estate of Henry H. Cunningham, deceased.

In witness whereof I have hereunto set my hand and official seal this 26th day of June, 1905.

[L. s.]

JAS. L. RODGERS,
Consul General, Acting Judicially.

I, James L. Rodgers, Consul General of the United States of America, at Shanghai China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America, at Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y 1907.

M. P. BOYD.

*Vice Consul General of the United States,
of America, at Shanghai, China."*

The said usurped and pretended administration of said decedent Henry H. Cunningham's estate, was further unlawfully and improperly carried out by the said defendant, James Linn Rodgers, in direct violation of his said consular duties, and in violation and breach of the conditions of his said consular bond and writing obligatory: in taking possession of decedent's bank deposit, and in collecting moneys amounting to, to wit, 74,704.08 Shanghai taels, or, to wit, \$52,292.00, and illegally and improperly disbursing and expending therefrom large sums for alleged probate court proceedings, as probate fees and costs therein, and for other purposes; in illegally and properly disbursing and paying to the said Mrs. A. C. Mather, in the State of Maine, sums aggregating to wit, 63,191.82 Shanghai taels, or to wit, \$41,673.70; in illegally and improperly disbursing and paying to Chang Chew, the Tunchow housekeeper of the said Henry H. Cunningham, to wit, 5,000 Shanghai taels or to wit, \$3,500.00; in illegally and improperly disbursing and paying to the said E. H. Dunning, to wit, 500 Shai-ghai taels, or to wit, \$350.00; and in illegally and improperly disbursing and paying moneys to others, all of which more fully appears from the following:

16 "Final Statement of E. H. Dunning, Executor of the Estate of H. H. Cunningham (Deceased).

Assets.

Uncollected div. warrants S'hai Tug & Lighter etc....	624.00
Sold 20 shares S'hai Land Investment Co.....	2,427.80
Sold 100 Astor House shares cum. div.....	2,288.01
Note due from Captain Arthur \$500 with interest.....	600.61
Sale 42 Telephone shares.....	2,716.35
Cash bal. in Bank w/int. as per pass book 30/6/05.....	36,760.89
Sale 136 ordinary shares Tug & Lighter Co.....	8,119.20
Div. 5 Pulp & Paper shares.....	30.00
Sold 303 Astor House shares cum. div.....	6,895.25
Balance due on note C. F. Fondey.....	150.00
Div. 68 pref. shares Tug & Lighter Co.....	119.00
Div. 403 Astor House shares.....	732.45
Sold 3 Gold drafts on London £100 each.....	2,211.13
Sold 68 shares Tug & Lighter "prefer-ed".....	3,180.02
Sold 10 Langkat's shares.....	1,716.38
Sold 5 Pulp & Paper shares.....	716.40
Interest of note \$4,000 due from W. Holliday to 1/10/05	877.57
Received on a/c above note.....	500.00
Daily interest Bank to 31/12/05.....	291.66
Balance due W. Holliday's note w/int. to 22/2/06....	3,714.58
Daily interest balance Bank to date.....	33.38
 Total Taels	 74,704.68

I, James L. Rodgers, Consul General of the United States of America, at Shanghai China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai China.

JAS. L. RODGERS,
*Consul General of the United States
of America, at Shanghai, China.*

Sworn and subscribed to before me this 16 day of Jan'y 1907.

M. P. BOYD,
*Vice Consul General of the United States
of America, at Shanghai, China."*

17 "Final Statement of E. H. Dunning, Executor of the Estate of H. H. Cunningham (Deceased).

Liabilities.

Cheque paid undertaker.....	193.00
Bequest to Tungchow Housekeeper.....	5,000.00
Paid Toeg & Reed purchasers of 303 Astor House shares div.....	552.97
Paid F. Robertson purchaser 100 Astor House shares div.....	179.48
Paid Dr. Cox yearly medical fee.....	100.00
Paid Dr. Paulun attendance last illness.....	160.00
Paid Pilot Office balance a/c.....	76.80
Paid Compradore sundry bills.....	168.67
Paid Tomb stone.....	400.00
Paid C. R. Holeomb attorney's fee 10% on note \$4,000 w/interest 5,092.13	509.21
Paid U. S. Consular fees.....	428.42
Administrator's fees 5% on \$74,704.68.....	3,735.23
Cable Mrs. Mather 25/2/06.....	9.08
Oct. 5/05 G. draft remitted G. \$35,000 at Ex 65 3/8.....	53,537.28
March 5th Gold \$ draft remitted G. \$.....	9,654.54
Total Taels	74,704.68

I, James L. Rodgers, Consul General of the United States of America, at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y 1907.

M. P. BOYD,
*Vice Consul General of the United States
of America at Shanghai, China."*

Hong King & Shanghai Banking Corporation.

Shanghai, 29th August, 1905.

W. P. Boyd, Esq., Vice Consul General in Charge, U. S. Consulate,
Shanghai.

DEAR SIR: In reply to your favor of 22nd inst., I beg to advise
that the following cheques signed by Mr. Dunning as Executor, were
charged to the account of the late Henry H. Cunningham.

18

Cheque #287252 dated 5, July 1905 in favor Chang

	Chou.....	Tls. 5,000.06
" 287256 "	5, Sept. " in favor Licensed	
	Pilots Assn.	76.80
" 287259 "	2, Sept. 1905 in favor F. Rob-	
	ertson	179.48
" 287260 in favor of H. k. & Shanghai Bank		53,537.28
" 287269 " of H. k. & Shanghai Bank		9,654.54

NOTE.—Cheque #287260 was in payment of a demand draft on
New York 41/749 dated 4, October 1905 in favor of Mrs. A. C.
Mather for G\$35,000 at 65 3/8%.

Cheque #287269 was in payment of a demand draft on New York
42/189 dated 5, March 1906 in favor of Mrs. A. C. Mather for
G#6,673.70 at 69 1/8—Tls. 9,654.54.

Yours faithfully,

ED. SAUNDERS,
Accountant.

U. S. Consulate General.

Shanghai, Aug. 30, 1906.

I hereby certify that the foregoing is a true and correct copy of a
letter received from the Hongkong & Shanghai Banking Corporation,
the original of which I have this day forwarded to Department
of State.

W. P. BOYD,
Vice Consul General.

I, James L. Rodgers, Consul General of the United States of
America, at Shanghai, China, certify that the foregoing is a true and
correct copy of the original document in the estate of Henry H.
Cunningham, deceased, on file in the American Consulate General at
Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

Sworn and subscribed to before me this 16 day of Jan'y 1907.

W. P. BOYD,

*Vice Consul General of the United States
of America at Shanghai, China.*

and in failing to transmit said estate as collected, or any part of said estate "to the Treasury of the United States, to be holden in trust for the legal claimant", as no "legal representative of the deceased" appeared in Shanghai, China, to demand the effects of the decedent in the hands of the said defendant, James Linn Rodgers, as aforesaid.

That the said defendant, James Linn Rodgers, violated his duty and further caused a breach of the condition of his said bond and writing obligatory under Section 1710 of the Revised Statutes of the

United States, in that he failed to obey the mandatory instruction therein contained to notify the death of the decedent to the plaintiff or to the Secretary of State, that the same might in turn have been duly and properly notified in the State of Maine, which was decedent's domicile; and likewise failed at that time to transmit to the Secretary of State any inventory of the effects of the deceased, as was required of him in and by said Section 1710 of the Revised Statutes, as aforesaid, for he neither made inventory or appraisal of said decedent's estate, or caused the same to be made.

That the said defendant, James Linn Rodgers, violated his said consular duty and further caused a breach of the condition of his said bond and writing obligatory under Section 1711 of the Revised Statutes of the United States, by usurping and assuming a jurisdiction of probate matters in order to pass upon the question as to whether the paper writing, brought by a stranger to the blood of the decedent Henry H. Cunningham to the Shanghai Consulate, constituted any "lawful testamentary disposition" of his property by said decedent, and likewise because said defendant, James Linn Rodgers, assumed and arrogated to himself as such Consul General "special directions for the custody and management * * * of the personal property" of deceased, when the paper writing in question gave to the said defendant, James Linn Rodgers, no such "special direction", as more particularly is shown by copy of said pretended Will, hereinbefore fully set out.

That the said defendant, James Linn Rodgers, violated his said consular duty, and further caused a breach of the condition of said bond and writing obligatory when by so attempting to administer the estate of the said Henry H. Cunningham, deceased, at Shanghai, China, as aforesaid, and by so failing and neglecting to transmit the estate of the said Cunningham to the United States, he violated his positive instructions contained in Section 409 of said Consular Regulations of 1896 (which said Consular Regulations were then in full force and effect as law by virtue of Section 1752 of the Revised Statutes of the United States, having been duly promulgated by the President of the United States for the government and control of Consuls General in China and elsewhere), which said section provides against and denies to him any right, power or authority to take, usurp, or use any probate jurisdiction whatsoever, and spe-

cifically denies to him the right "to administer on the estate" of any decedent dying within his consular district, "without judicial authorization", as his duties are restricted to guarding and collecting the effects, and to transmitting them to the United States * * * to be disposed of pursuant to the law of the decedent's State".

That the said defendant, James Linn Rodgers, further violated his said consular duty and further caused a breach of the condition of his said bond and writing obligatory, under Section 409 of said Consular Regulations, when he failed to guard and collect the effects of plaintiff's deceased brother, the said Henry H. Cunningham.

That the said defendant, James Linn Rodgers, further violated his said consular duty and further caused a breach of his said bond and writing obligatory, under Section 409 of said Consular Regulations, when he failed to transmit said decedent, Henry H. Cunningham's effects to the United States, to be disposed of pursuant to the law of decedent's State.

20 That under Article 25 of the Treaty of the United States with China of 1884, continued in force to the present time by subsequent treaties, the defendant, James Linn Rodgers, only had a limited jurisdiction as to "All questions in regard to rights, whether of property or person arising between citizens of the United States in China" and the said defendant, James Linn Rodgers, violated his duty and further caused a breach of the condition of his said bond and writing obligatory when without right, power or authority he usurped the jurisdiction of the courts of the State of Maine, in attempting to pass upon the rights of plaintiff and others residing in the United States, and never resident, sojourning or comorant in Shanghai, China; and further violated his duty and further caused a breach of his said bond and writing obligatory by failing to send or give notice to plaintiff and other parties lawfully interested in the estate of the said Henry H. Cunningham, who died within the consular district of the port of Shanghai, China, that a so-called and pretended probate court would be held at Shanghai, China, to pass upon the validity of a certain paper writing offered by a stranger in blood to the intestate for probate and record as the last will and testament of Henry H. Cunningham, deceased.

There being no "local law" of the then Chinese Empire intervening or affecting in any way the property of citizens of the United States dying in China, the said defendant, James Linn Rodgers, further violated his duty and further caused a breach of the condition of his said bond and writing obligatory when by recognizing, as aforesaid, the said E. H. Dunning as Executor under the said paper writing alleged to be the will of said Henry H. Cunningham, deceased, before the said Dunning had duly and regularly qualified as such before any court of proper and competent probate jurisdiction in the United States, and as well by usurping and assuming jurisdiction to administer upon the estate of the said Henry H. Cunningham, deceased, he departed from the "usage" established by United States Consuls in China, by the practice of United States Consuls General in the Port of Shanghai and elsewhere in China, by Sections 1709, 1710 and 1711 of the Revised Statutes of the United States and Sec-

tion 409 of the Consular Regulations of 1896 as aforesaid, by virtue of the Treaty of 1844, as better and more at large appears from the authenticated and official list of all the entries and accounts of the estates of citizens of the United States who died in the Shanghai Consular District of China, sent by the United States Consuls General at Shanghai, China, received in the office of the Auditor for the State and other Departments, and recorded in Book One, "Estates of American Citizens", which said list was duly certified to July 5, 1906, under the hand and official seal of J. H. Edwards, Assistant Secretary of the Treasury, as hereinbefore in this count has been fully set forth.

By reason of all of which foregoing premises plaintiff has been injured and the action at law to recover the penal sum of \$8,000 against the defendants and each of them for breach of condition of their said bond and writing obligatory hath arisen and accrued to the plaintiff; wherefore he brings this his said suit in the sum of \$8,000, which said sum he claims to be now justly due and owing by said defendants, besides costs.

21 Second Count. Plaintiff, Edward R. Cunningham, a citizen of the United States and a resident of the District of Columbia, further sues under and by virtue of the statutes in such case made and provided, in his own right the defendants, James Linn Rodgers, as principal upon his certain writing obligatory; Andrew Denny Rodgers, as surety upon the same writing obligatory, and Frank R. Shinn, likewise as surety upon the said writing obligatory, for that: Whereas the same defendant, James Linn Rodgers, was duly nominated by the President of the United States as Consul General to the United States Consular district of Shanghai, China, and was duly confirmed by the Senate of the United States, and thereafter, to wit: on the 27th day of March, 1905, in the City of Columbus, County of Franklin, State of Ohio, duly executed his certain writing obligatory, as principal, and had execute the same writing obligatory Andrew Denny Rodgers and Frank R. Shinn, as sureties thereunder, which said writing obligatory, on a form prepared by the Department of State, and executed by being duly and properly signed by each of the aforesaid defendants, and sealed with their seals, is now shown to the Court here; whereby the said defendants, and each of them, did thereby acknowledge themselves, their joint and several heirs, executors and administrators, to be jointly and severally held and firmly bound to the United States of America (and the said plaintiff under and by virtue of Sections 1735 and 4110 of the Revised Statutes of the United States, and Section 1697 of the Revised Statutes of the United States, as amended by Act of December 21, 1898—30 Stats. L. 770—together with Section 481 of the Code of Laws of the District of Columbia) in the penal sum of \$8,000.00, lawful money of the United States, for the payment of which well and truly to be made, the defendants, and each of them, bound themselves, their heirs, executors and administrators, jointly and severally; which said bond and writing obligatory, after its execution as aforesaid, was delivered to the Department of State, at Washington, District of Columbia, was duly approved March 29,

1905, and immediately thereafter was deposited with the Secretary of the Treasury; and the said James Linn Rodgers was thereupon duly commissioned as such United States Counsel General at Shanghai, China, and thereafter entered upon his duties as such Consul General at the port of Shanghai, China.

Whereas the said bond and writing obligatory was and is subject to a certain condition therein written to the effect that if the said James Linn Rodgers, one of the above named defendants, a duly commissioned and acting Consul General of the United States, at Shanghai, China, as aforesaid "shall truly and faithfully discharge the duties of his said office according to law * * * then this obligation to be void, otherwise to remain in full force"; but the said defendant, James Linn Rodgers, did not "truly and faithfully discharge the duties of his said office according to law", but in violation of his said consular duties and of the law pertaining to the government and control of his said consular office, caused a breach of the condition of his said bond and writing obligatory, in that, when one Henry H. Cunningham, a citizen of the United States, whose legal domicile was in Belfast, County of Waldo, State of Maine, died within the consular district of the said defendant, James Linn Rodgers, in Shanghai,

China, on or about June 10, 1905, leaving an estate of the
22 estimated value of over \$50,000,—without leaving legal representative, partner in trade, or trustee by him appointed to take care of his effects, in China, and leaving no widow, heirs at law or next of kin in China, although leaving plaintiff, a brother of decedent, a citizen of the United States and a resident of the District of Columbia, and leaving one other brother, Albert W. Cunningham, and two sisters, Mrs. A. C. Mather and Mrs. Helen Berry, all citizens of the United States, and domiciled in the State of Maine,—which said estate it became and was the duty of the said defendant, James Linn Rodgers, United States Consul General at the Port of Shanghai, China, as aforesaid, to take possession of and conserve for plaintiff; that there was left by said decedent certain valuable real property in the Pao Shan District in Shanghai, China, of the value of, to wit, \$5,000.00, which, outstanding in decedent's name in the Land Records of said United States Consulate at Shanghai, China, it was the duty of the said defendant, James Linn Rodgers, to conserve to said decedent's estate; but notwithstanding his said duty in this respect and in utter violation thereof, and in breach of the condition of his said bond and writing obligatory, he, the said defendant, James Linn Rodgers, instructed one E. H. Dunning to convey and transfer the same over to a certain Mrs. Green, gratuitously, and without any consideration passing therefor, four days after he had illegally and improperly granted alleged letters testamentary to the said E. H. Dunning, as more particularly appear from the following excerpt from the official report to the Department of State, Washington, D. C., by one Amos P. Wilder, American Consul General, Shanghai, China, under date of July 14, 1911, as follows:

"There is no document on file in the Land Office of the Consulate General, to show that Mr. Dunning was executor or that he

had authority to transfer to Mrs. Green, but the endorsement in the Title Register transferring to Mrs. Green is signed 'E. H. Dunning, Executor of the estate of Henry H. Cunningham, Deceased', and made four days after letters testamentary were granted to him. Mr. Dunning says in 'Exhibit D', statement of April 23, 1910, 'Mr. Rodgers after looking over his deed and an endorsement on the back ordered me to transfer lot known as P. No. 77 to Mrs. Green, which I did before leaving the Consulate.'";

that no such real estate was devised or sought to be devised under the paper writing hereinbefore referred to as the pretended last will and testament of the said Henry H. Cunningham, deceased, as is better shown by the copy of said alleged Will, hereinbefore impleaded and set out at large in the first count of this Declaration at pages 10 and 11 thereof; and said assumption of a jurisdiction and power to so instruct the said E. H. Dunning, was wholly illegal and void, although having the effect of dissipating a valuable part of plaintiff's deceased brother's estate, to the consequent loss of plaintiff by this, said defendant James Linn Rodgers' violation and breach of the condition of his bond and writing obligatory, so as aforesaid given to insure plaintiff all legal and proper protection of his said interests in and to his deceased brother's estate, as aforesaid.

23 By reason of all of which aforesaid premises plaintiff has been injured, and the action at law to recover the penal sum of \$8,000.00 against the defendants, and each of them, for breach of condition of their said bond and writing obligatory, hath arisen and accrued to the plaintiff; wherefore he brings this his said suit in the sum of \$8,000.00, which said sum he claims to be now justly due and owing him by said defendants, besides costs.

Third Count. Plaintiff, Edward R. Cunningham, a citizen of the United States and a resident of the District of Columbia, further sues under and by virtue of the statutes in such case made and provided, in his own right the defendants, James Linn Rodgers, as principal upon his certain writing obligatory; Andrew Denny Rodgers, as surety upon the same writing obligatory, and Frank R. Shinn, likewise as surety upon the said writing obligatory, for that: Whereas the said defendant, James Linn Rodgers, was duly nominated by the President of the United States as Consul General to the United States Consular district of Shanghai, China, and was duly confirmed by the Senate of the United States, and thereafter, to wit: on the 27th day of March, 1905, in the City of Columbus, County of Franklin, State of Ohio, duly executed his certain writing obligatory, as principal, and had execute the same writing obligatory Andrew Denny Rodgers and Frank R. Shinn, as sureties thereunder, which said writing obligatory, on a form prepared by the Department of State, and executed by being duly and properly signed by each of the aforesaid defendants, and sealed with their seals, is now shown to the Court here; whereby the said defendants, and each of them, did thereby acknowledge themselves, their joint and several heirs, executors and administrators, to be jointly and severally held and firmly bound to

the United States of America (and the said plaintiff under and by virtue of Sections 1735 and 4110 of the Revised Statutes of the United States, and Section 1697 of the Revised Statutes of the United States, as amended by Act of December 21, 1898—30 Stats. L. 770—together with Section 481 of the Code of Law of the District of Columbia) in the penal sum of \$8,000.00, lawful money of the United States, for the payment of which well and truly to be made, the defendants, and each of them, bound themselves, their heirs, executors and administrators, jointly and severally; which said bond and writing obligatory, after its execution as aforesaid, was delivered to the Department of State, at Washington, District of Columbia, was duly approved March 29, 1905, and immediately thereafter was deposited with the Secretary of the Treasury; and the said James Linn Rodgers was thereupon duly commissioned as such United States Consul General at Shanghai, China, and thereafter entered upon his duties as such Consul General at the port of Shanghai, China.

Whereas the said bond and writing obligatory was and is subject to a certain condition therein written, to the effect that if the said James Linn Rodgers, one of the above named defendants, a duly and commissioned and acting Consul General of the United States,

at Shanghai, China, as aforesaid "shall truly and faithfully
24 discharge the duties of his said office according to law

* * * then this obligation to be void, otherwise to remain in full force"; but the said defendant, James Linn Rodgers, did not "truly and faithfully discharge the duties of his said office according to law," but in violation of his said consular duties and of the law pertaining to the government and control of his said consular office, caused a breach of the condition of his said bond and writing obligatory, in that, when one Henry H. Cunningham, a citizen of the United States, whose legal domicile was in Belfast, County of Waldo, State of Maine, died within the consular district of the said defendant James Linn Rodgers, in Shanghai, China, on or about June 10, 1905, leaving an estate of the estimated value of over \$50,000,—without legal representative, partner in trade, or trustee by him appointed to take care of his effects in China, and leaving no widow, heirs at law or next of kin in China, although leaving plaintiff, a brother of decedent, a citizen of the United States, domiciled in the District of Columbia, and leaving one other brother, Albert W. Cunningham, and two sisters, Mrs. A. C. Mather and Mrs. Helen Berry, all citizens of the United States and domiciled in Maine,—which said estate it became and was the duty of the said defendant, James Linn Rodgers, Consul General of the Port of Shanghai, China, as aforesaid, to take possession of and conserve for plaintiff; that under the laws of the State of Maine, decedent's domicile, plaintiff was, and is, entitled to one-quarter of the said estate of his said deceased brother; that the said defendant, James Linn Rodgers, was legally charged with knowledge that said decedent had no partner in trade or legal representative in China, and left no heirs at law and next of kin therein, but that said decedent had heirs at law and next of kin in the United States, viz: plaintiff and others, as aforesaid, when it further became and was the duty of the said defendant James Linn Rodgers legally and properly to notify the said plaintiff of any as-

sumed probate jurisdiction, or intended or pretended administration upon said decedent's estate, in order that appropriate and proper action might seasonably have been instituted and taken by said plaintiff properly to preserve and protect his interest in and to said brother's estate; but notwithstanding his said duty in this regard, as specifically enjoined upon him under and by virtue of Section 4110 of the Revised Statutes of the United States, and further because he had actual knowledge that the length of time for any person to travel from the Pacific Coast of the United States to China, or from China to the said Pacific Coast, takes at least twenty to twenty-four days, and that between the Atlantic Coast and China the time of communication is much longer, he, the said James Linn Rogers, as United States Consul General of the Port of Shanghai, China, and under color of his public office as such Consul General, became and was wilfully negligent and wantonly misconducted his said consular office in the performance of his said duties and violated and breached the condition of his said bond and writing obligatory so as aforesaid given to insure plaintiff all legal and proper protection of his said interests in and to his said deceased brother's estate, on the 13th day of

June, 1905, by publishing on that date in local newspapers
25 in the said Port of Shanghai, China, having no circulation in
the United States, of a mere eight days' notice of his intention
to hear the petition of one Edward H. Dunning, a stranger to the
blood of said decedent, for the admission to probate and record of a
certain paper writing alleged to be the last will and testament of said
decedent, which said paper writing, witnessed by but two witnesses,
was as said defendant James Linn Rodgers well knew, invalid and
void as a legal testamentary disposition, and was of no force and ef-
fect under the laws of decedent's domicile, viz: Belfast, Waldo
County, Maine, United States of America; and further the said de-
fendant James Linn Rodgers became and was wilfully negligent and
wantonly misconducted his said consular office in the performance of
his said duties by assuming on the 23rd day of June, 1905, after but
the said eight days' notice by publication, as aforesaid, to go through
the pretended form of administration on said decedent's estate,—
whereby defendant James Linn Rodgers again violated and breached
the conditions of his said bond and writing obligatory so as afore-
said given to insure plaintiff all legal and proper protection of his
said interests in and to his said deceased brother's estate, and plain-
tiff thereby suffered the complete loss of his said distributive share
in his said brother's estate:

By reason of all of which aforesaid premises plaintiff has been
injured, and the action at law to recover the penal sum of \$8,000.00
against the said defendants, and each of them, for breach of condi-
tion of their said bond and writing obligatory, hath arisen and
accrued to the plaintiff; wherefore he brings this his said suit in the
sum of \$8,000.00, which said sum he claims to be now justly due
and owing him by said defendants, besides costs.

GEORGE F. CURTIS,
CLINTON ROBB,
LEONARD J. MATHER,

Attorneys for Plaintiff.

Affidavit of Merit.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

Edward R. Cunningham on oath says that he is a citizen of the United States, a resident of the District of Columbia, and is the plaintiff named in the foregoing action at law in which James Linn Rodgers, Andrew Denny Rodgers and Frank R. Shinn are sued as defendants to recover from them, or either of them, the \$8,000.00 now due and owing by said defendants, and each of them, to said plaintiff, for condition broken under their certain bond, as the same appears by the certified copy of said bond hereto attached and made a part hereof as though fully and at large appearing herein.

That the said defendant, James Linn Rodgers, nominated and confirmed as United States Consul General to the port of Shanghai, China, on the 27th day of March, 1905, executed the aforementioned bond, as principal, and had the defendants Andrew Denny Rodgers and Frank R. Shinn execute the same bond as sureties thereunder, thereby insuring said plaintiff against injury and loss to the amount of the penal sum of said bond of \$8,000, which might result to him, said plaintiff, from any breach of the condition of said bond on the part of the said defendant, James Linn Rodgers, in failing to "truly and faithfully discharge the duties of the said office according to law"; that thereafter the said defendant, James Linn Rodgers, was duly commissioned as such United States Consul General at Shanghai, China, and duly entered upon his said duties as such United States Consul General at Shanghai, China; when affiant's brother, one Henry H. Cunningham, sixty-seven years of age, a citizen of the United States and legally domiciled in Belfast, Waldo County, State of Maine (as said decedent always claimed and referred to the same as his home and always evidenced an intention of there returning, and on his said alleged Will and in the petition for its admission to probate and record, the same claim is made, appears and was well recognized by said defendant, James Linn Rodgers) died when sojourning and commorant in China, within the consular district of Shanghai, China, on June 10, 1905, leaving an estate of the value of over \$50,000, (the same being 74,704.68 Shanghai taeis, equivalent at exchange 70 to \$52,272.80) but leaving no legal representative, partner in trade or trustee, or heirs at law or next of kin in China, although leaving affiant in Washington City, District of Columbia, and leaving also Albert W. Cunningham another brother of said decedent, living and domiciled in the State of Maine; and Mrs. A. C. Mather and Mrs. Helen Berry, both of whom likewise lived and were domiciled in the State of Maine, which foregoing facts were all well known to said defendant, James Linn Rodgers; that thereafter there was brought to said Consulate in Shanghai, China, by one E. H. Dunning, a stranger to the blood of decedent, on to wit, June 13, 1905, a certain paper writing purporting to be the last will and testament of the said Henry H. Cun-

ningham, deceased, and the said defendant, James Linn Rodgers, well knowing that as such United States Consul General of Shanghai, China, he had no probate jurisdiction and no right, power or authority to administer upon the estates of decedents dying within his consular district—which right, power and authority was expressly denied to him by Statute and his own Consular Regulations, 1893—yet nevertheless pretended to believe that he had such probate jurisdiction and the right, power and authority to administer upon the estates of decedents dying within his said consular district, to hold a court of probate jurisdiction and power, and thereupon took and arrogated to himself as such United States Consul General of Shanghai, China, the right to admit to probate and record the paper writing aforesaid as the last will and testament of affiant's said brother, the said Henry H. Cunningham, and administer upon the estate of said affiant's deceased brother in violation of his duty and in breach of the condition of his said bond; and thereafter said

defendant, James Linn Rodgers, although well knowing that

27 said decedent Henry H. Cunningham, sojourning and com-
morant in Shanghai, China, was legally domiciled in Belfast,
Maine, United States of America, and that any lawful testamentary
disposition of his said property and estate would have to be in ac-
cordance with the laws of his said domicile, and furthermore well
knowing that under the laws of the State of Maine three witnesses
were necessary to a valid testamentary disposition and that the paper
writing supposed to have been made by the said decedent as and for
his last will and testament bore the signatures of but two witnesses,
he therefore was charged with notice, as a matter of law, that said
paper writing in question was invalid, void and of no effect to pass
anything thereunder; and said defendant, James Linn Rodgers, fur-
thermore knew that E. H. Dunning, the executor named in this
paper writing was not qualified and could not qualify as such before
any court of decedent's domicile in Maine—which alone had juris-
diction, power and authority to hear and determine such questions—
and that he, said defendant, as said United States Consul General at
Shanghai, China, had no power to qualify the said E. H. Dunning
as executor, yet nevertheless pretending to believe that he had such
right, power and authority, he unlawfully and improperly assumed
and arrogated to himself as such Consul General of Shanghai, China,
the pretended right, power and authority to himself qualify E. H.
Dunning as the named executor under the invalid and void paper
writing above referred to, and attempt to admit the said paper writ-
ing to probate and record as the last Will and testament of said de-
cedent before him as such United States Consul General of Shanghai,
China, although well knowing such conduct on his part was in utter
violation of his said consular duty, and was in further breach of the
condition of his consular bond, so given as aforesaid to insure to
affiant the proper and legal protection of his one-fourth interest in
and to his said deceased brother's estate; and said defendant, James
Linn Rodgers, further violated his said consular duty and further
breached the condition of his said consular bond when, well know-
ing that none of decedent's heirs at law and next of kin resided in

China, but were all citizens of the United States and were living and domiciled there, by going through the form of publishing a notice for eight or ten days in the Chinese local newspapers (which have no circulation in the United States) when well knowing it would take at least twenty to twenty-four days for mail to travel one way between the Chinese and Pacific Coasts, and considerably longer for it to go to the Atlantic Coast, and that it was his bounden duty to give affiant plaintiff and the other heirs at law and next of kin of said decedent proper and ample notice of any such pretended administration upon the estate of the said Henry H. Cunningham, that their rights, and particularly those of affiant, plaintiff herein, might properly have been protected.

Affiant further says that the said James Linn Rodgers, although well knowing it was his duty when said Henry H. Cunningham died intestate, leaving in Shanghai, China, no legal representative, partner in trade or trustee by him appointed to take care of his effects, to take possession of all of said effects and personal estate left by said decedent and transmit the same to the Treasury of the United States to be there holden in trust for the legal claimant under the laws of decedent's State (of whom affiant was one to the extent of a one-fourth interest therein) and likewise well knowing that even had he, said defendant, James Linn Rodgers, brought himself to believe that the said Henry H. Cunningham had died lawfully testate, it was nevertheless his duty as such United States Consul General of Shanghai, China, to inventory decedent's said estate and notify the Secretary of State, at Washington, District of Columbia, of said decedent's death, discharge the legal debts of said decedent and then transmit the balance to the Treasury of the United States to be holden in trust for the legal claimant (of whom affiant was one to the extent of a one-fourth interest therein); and that by his utter failure so to do, said defendant, James Linn Rodgers, further violated his consular duty and further caused a breach of the condition of his said bond, and affiant further says that it was the bounden duty of the said defendant, James Linn Rodgers, as United States Consul General of Shanghai, China, to conserve said decedent's estate and in no wise to dissipate the same, but in violation of his duty and in breach of his consular bond, as aforesaid, he instructed the named executor in this paper writing—void as a will to pass anything thereunder—to convey certain land worth, to-wit, \$5,000.00, to a Mrs. Green, an American citizen, then living in Shanghai, China, without consideration or return to said decedent's estate for so doing, and further, he paid to one Tungehow, a Chinese woman in Shanghai, China, 5,000.00 taels, or to wit, \$3,500.00, to the consequent further loss of said decedent's estate; and he took and paid for administration fees 5% on 74,704.68 taels, or to wit, \$3,735.23, to the consequent further loss of affiant's deceased brother's estate; all in violation of his said consular duty and in breach of his said consular bond so as aforesaid given; and further said defendant, James Linn Rodgers, after unlawfully assuming the probate jurisdiction illegally to determine that the before-mentioned paper writing—void and of no effect as a valid testamentary disposition—

was the last will and testament of the decedent, Henry H. Cunningham, he, the said defendant, James Linn Rodgers, took it upon himself, in violation of his said consular duty, and in further breach of his said consular bond, to administer upon said decedent's estate as though said writing paper was the valid will of said decedent, Henry H. Cunningham, and to send to Mrs. A. C. Mather 63,191.82 taels, or to wit, \$41,673.70, at the rate of exchange then given by the defendant, James Linn Rodgers; thereby unlawfully and improperly depriving affiant plaintiff of his one-fourth interest of over \$12,000.00 in his said deceased brother's estate, and said plaintiff affiant accordingly has been injured in the full amount of the penal sum of said defendants' bond.

29 The above more fully and at large appears from the following, as the same has been duly certified to by the said defendant, James Linn Rodgers:

"Will."

This is the last will of me, Henry H. Cunningham of Belfast Maine U. S. A. and residing in Shanghai, China.

First, I give to my Chinese mistress Tung-ehoe Tls Five thousand (Tls 5,000) to be paid to her in cash in one month from my death, and also everything in my house at Shanghai.

Second, I give to E. H. Dunning of Shanghai (Tls 500) Tls five hundred also five shares in Central hotel Limd now registered in my name.

When my just debts and funeral expenses and the above amounts are paid I give to my sister Augusta now Mrs. A. C. Mather of Rockland Maine U. S. A. the Balancee of my property what ever there may be and in case of Mrs. A. C. Mather's death I will that it shall be equally divided between Mrs. A. C. Mather's son Harry of Rockland Maine U. S. A. and my Brother's daughter E. R. Cunningham of Washington D. C. U. S. A.

Should I have any floating property advertise it in the local papers for thirty days and sell it at public auction Any shares I may have except five (5) shares in Central Stores Limd to be sold in Sixty days in the best market.

And I will that my Execeter gives no bonds.

And I nominate E. H. Dunning of Shanghai to be the sole Execeter of this my last will and revoke all other wills.

HENRY H. CUNNINGHAM.

Shanghai, June 13" 1900.

Witness:-

H. W. CHURCHILL.
THOS. F. EARLE."

In the Matter of the ESTATE OF HENRY H. CUNNINGHAM, Deceased.

A document purporting to be the last will and testament of Henry H. Cunningham, deceased, having been presented to this Court by

30

E. R. CUNNINGHAM VS. J. L. RODGERS ET AL.

Edward H. Dunning, and petition having been made by the said Edward H. Dunning asking for the probate thereof and for the issuance of Letters Testamentary thereon.

It is hereby ordered that Wednesday the 21st day of June, 1905 at 10 o'clock in the forenoon of said day at the courtroom of the above named Court be and the same hereby is appointed the time and place for proving said will, and hearing said petition, when and where any person interested may appear and contest the same and may file objections in writing to the granting of Letters Testamentary thereon.

It is further ordered that notice be given thereof by publication in the Shanghai Mercury, The North China Daily News and The Shanghai Times for six issues previous to said hearing and
 30 that a notice be posted on the bulletin board at the American Consulate General at Shanghai.

By the Court:

JAS. L. RODGERS,
Judge.

Dated June 13, 1905,

[L. S.]

I, James L. Rodgers, Consul General of the United States of America at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
 of America, at Shanghai, China.*

Sworn and subscribed to before me this 16th day of Jan'y 1907,

M. P. BOYD,
*Vice Consul General of the United States
 of America, at Shanghai, China.*

"Final Statement of E. H. Dunning, Executor of the Estate of H. H. Cunningham, (Deceased).

Assets.

Uncollected div. warrants S'hai Tug & Lighter etc.,	624.00
Sold 20 shares S'hai Land Investment Co.	2,427.80
Sold 100 Ator House shares cum. div.	2,288.01
Note due from Captain Arthur \$500 with interest.	600.61
Sale 42 Telephone shares.	2,716.35
Cash bal. in Bank w/int. as per pass book 30/6/05.	36,760.89
Sale 136 ordinary shares Tug & Lighter Co.	8,119.20
Dia. 5 Pulp & Paper shares.	30.00
Sold 303 Astor House shares cum. div.	6,895.25
Balance due on note C. F. Fonday.	150.00
Div. 68 pref. shares Tug & Lighter Co.	119.00
Div. 403 Astor House shares.	732.45
Sold 3 Gold drafts on London £100 each.	2,211.13
Sold 68 shares Tug & Lighter "preferred".	3,180.02
Sold 10 Langkat's shares.	1,716.38
Sold 5 Pulp & Paper shares.	716.40
Interest of note \$4,000 due from W. Holliday to 1/10/05	877.57
Received on a/c above note.	500.00
Daily interest Bank to 31/12/05.	291.66
Balance due W. Holliday's note w/int. to 22/2/06.	3,714.58
Daily interest balance Bank to date.	33.38
Total Taels	74,704.68

31 I, James L. Rodgers, Consul General of the United States of America, at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai China.

JAS. L. RODGERS,
*Consul General of the United States
 of America at Shanghai, China.*

Sworn and subscribed to before me this 16 day of Jan'y, 1907,
 M. P. BOYD,
*Vice Consul General of the United States
 of America at Shanghai, China."*

"Final Statement of E. H. Dunning, Executor of the Estate of H. H. Cunningham (Deceased)."

Liabilities.

Cheque paid undertaker.....	193.00
Bequest to Tungchow Housekeeper.....	5,000.00
Paid Toeg & Read purchasers of 303 Astor House shares div.....	552.97
Paid F. Robertson purchaser 100 Astor House shares div.	179.48
Paid Dr. Cox yearly medical fee.....	100.00
Paid Dr. Paulun attendance last illness.....	160.00
Paid Pilot Office balance n/e.....	76.80
Paid Compradore sundry bills.....	168.67
Paid Tomb stone.....	400.00
Paid C. R. Holcomb attorney's fee 10% on note \$4,000 w/interest 5,092.13	509.21
Paid U. S. Consular fees	428.42
Administrator's fees 5% on \$74,704.68	3,735.23
Cable Mrs. Mather 25/2/06.....	9.08
Oct. 5/06 G draft remitted G. \$35,000 at Ex 65 3/8.....	53,537.28
March 5th Gold \$ draft remitted G. \$.....	9,654.54
 Total Taels	 74,704.68

I, James L. Rodgers, Consul General of the United States of America, at Shanghai, China, certify that the foregoing is a true and correct copy of the original document in the estate of Henry H. Cunningham, deceased, on file in the American Consulate General at Shanghai China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

32 Sworn and subscribe- to before me this 16th day of Jan'y,
1907.

M. P. BOYD,
*Vice Consul General of the United States
of America at Shanghai, China."*

"HONG KONG & SHANGHAI BANKING CORPORATION,
SHANGHAI, 29th August, 1905.

W. P. Boyd, Esq., Vice Consul General in Charge, U. S. Consulate,
Shanghai.

DEAR SIR: In reply to your favor of 22nd inst., I beg to advise
that the following cheques signed by Mr. Dunning as Executor,
were charged to the account of the late Henry H. Cunningham.

Cheque #287,252 dated 5, July 1905 in favor

Chang Chou Tls	5,000.00
" \$287,256 dated 5, Sept. " "	76.80
Licensed Pilots Assn.	
" #287,259 dated 2, Sept. " "	179.48
F. Robertson	
" #287,260 in favor of H. k. & Shanghai	53,537.28
Bank	
" #287,269 " "	9,654.54
Bank	

NOTE.—Cheque #287,260 was in payment of a demand draft on
New York 41/749 dated 4, October 1905 in favor of Mrs. A. C.
Mather for G#35,000. at 65, 3/8—Tls. 53,537.28.

Cheque #287,269 was in payment of a demand draft on New
York 42/189 dated 5, March 1906 in favor of Mrs A. C. Mather for
G\$6,673.70 at 69 1/8—Tls. 9,654.54.

Yours faithfully,

ED. SAUNDERS,
Accountant.

U. S. Consulate General,
Shanghai, Aug. 30, 1906.

I hereby certify that the foregoing is a true and correct copy of
a letter received from the Hongkong & Shanghai Banking Corporation,
the original of which I have this day forwarded to Department
of State.

W. P. BOYD,
Vice Consul General.

I, James L. Rodgers, Consul General of the United States of
America, at Shanghai, China, certify that the foregoing is a true and
correct copy of the original document in the estate of Henry H.
Cunningham, deceased, on file in the American Consulate General
at Shanghai, China.

JAS. L. RODGERS,
*Consul General of the United States
of America at Shanghai, China.*

34 E. R. CUNNINGHAM VS. J. L. RODGERS ET AL.

33 Sworn and subscribed to before me this 16 day of Jan'y
1907.

W. P. BOYD,

*Vice Consul General of the United States
of America at Shanghai, China."*

Wherefore plaintiff says there is now justly due and owing him by said defendants, and each of them, the above mentioned amount of \$8,000.00, exclusive of all set-offs and just grounds of defense.

EDWARD R. CUNNINGHAM.

DISTRICT OF COLUMBIA, *To wit:*

Edward R. Cunningham, upon oath, states that he has read the foregoing affidavit by him subscribed and knows the contents thereof; that the statements of fact therein made of his own knowledge are true, and those made upon information and belief, he believes to be true.

EDWARD R. CUNNINGHAM.

Subscribed and sworn to before me this 23rd day of March, 1917.

[SEAL.]

C. LARIMORE KEELEY,

Notary Public, D. C.

Copy of Bond Referred to on Page One of Affidavit of Merit Herein.

United States of America,

Treasury Department.

March 10, 1917.

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed is a true copy of the original bond on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

B. R. NEWTON,

*Assistant Secretary of
the Treasury.*

J.

L. J.

Treasury Department, Chief Clerk and Superintendent.
Form 68.

Know all men by these presents:

That we, James Linn Rodgers, principal, and Andrew Denny Rodgers and Frank R. Shinn sureties, the two last named being

34 permanent residents of the United States residing at Columbus, State of Ohio, are held and firmly bound to the United States of America in the sum of eight (8) thousand dollars, money of the said United States, to the payment whereof we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators.

Witness our hands and seals this Twenty-seventh day of March, 1905.

The condition of the above obligation is such, That the above-bounden James Linn Rodgers, appointed Consul General of the United States at Shanghai, China, shall truly and faithfully discharge the duties of his said office according to law, and shall truly and faithfully account for, pay over, and deliver up all fees, moneys, goods, effects, books, records, papers, and other property which shall come into the hands of the said James Linn Rodgers, or into the hands of any other person, to his use as such Consul General under any law now or hereafter enacted, or by virtue of his office, and that he shall truly and faithfully perform all other duties now or hereafter lawfully imposed upon him as such Consul General. And these presents are subject to this other and further condition, that he, the said James Linn Rodgers, will not, while he holds the said office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as a clerk or other agent for any such person, to, from, or within the port, place, or limits of his consular district, directly or indirectly, either in his own name or in the name or through the agency of any other person; and, in case he, the said James Linn Rodgers, shall violate the provisions of this condition, that then the above-named obligors shall be liable to said obligees to a penalty for the breach of such condition in a sum equal to the amount of the annual compensation of said James Linn Rodgers, which is hereby stipulated, agreed upon, and admitted by way of liquidated damages; but that this condition shall not impair or prevent the right of the United States to prosecute said James Linn Rodgers for the recovery of said penalty against him, the said James Linn Rodgers, individually, the same as if this bond had not been given; and if the said James Linn Rodgers shall conform to all the above conditions, then this obligation to be void; otherwise to remain in full force.

And further, in case suit is brought upon this bond, if the principal resides in a foreign country, it is agreed that the service upon him of summons or other process by filing a certified copy of the same with the Secretary of the Treasury shall be accepted as sufficient to give the court jurisdiction over the person and property of the defendant.

JAMES LINN RODGERS. [SEAL.]
ANDREW DENNY RODGERS. [SEAL.]
FRANK R. SHINN. [SEAL.]

Signed, sealed and delivered in the presence of—
JNO. B. DURY.
GEO. C. BLANKNER.

35 STATE OF OHIO,

County of Franklin, ss:

I, Andrew Denny Rodgers, the within-named surety on the official bond of James Linn Rodgers, appointed Consul General at Shanghai, China, do solemnly swear that I am reasonably worth the sum of Eight thousand dollars over and above all debts, liabilities, and property exempt from execution, and that I executed and delivered the within bond without any condition, reservation, or agreement other than appears on the face thereof.

My address is No. 632 East Broad street, Columbus, Ohio.

ANDREW DENNY RODGERS.

Subscribed and sworn to before me this 27th day of March, 1905.
Witness my hand and seal.

GEO. C. BLANKER. [L. s.]

STATE OF OHIO,

County of Franklin, ss:

I, Frank R. Shinn, the within-named surety on the official bond of James Linn Rodgers, appointed Consul General at Shanghai, China, do solemnly swear that I am reasonably worth the sum of Eight thousand dollars over and above all debts, liabilities, and property exempt from execution, and that I executed and delivered the within bond without any condition, reservation, or agreement other than appears on the face thereof.

My address is No. 90 Hamilton Ave. [street]*, Columbus, Ohio.

FRANK R. SHINN.

Subscribed and sworn to before me this 27th day of March, 1905.
Witness my hand and seal.

GEO. C. BLANKER. [L. s.]

I, Edward L. Taylor, Jr., hereby certify that Andrew Denny Rodgers and Frank R. Shinn, the sureties named in the within bond, are severally sufficient to pay the penalty thereof, and that they are citizens of The United States of America and residents of Columbus, Ohio.

EDWARD L. TAYLOR, JR.,
Member of Congress, 12th District of Ohio.

Dated at Columbus, Ohio, March 27, 1905.

[*Words enclosed in brackets erased in copy.]

Department of State.

Washington, March 29, 1905.

Approved.

ALVEY A. ADEE,
Acting Secretary of State,
R. B. M.

36 Mr. Rodgers is a citizen of the United States.

ROBERT BRENT MOSHER,
Chief of the Bureau of Appointments.

*The following instructions must be particularly observed and complied with:

1st. The Christian names must be written in the body of the bond in full, and so signed to the bond.

2d. A seal to be attached to each signature.

3d. Each signature must be made in the presence of two persons, who must sign their names as witnesses.

4th. Sureties must be permanent residents of the United States.

*5th. The United States attorney of the district in which the sureties reside, or a member of the Senate or House of Representatives of the United States, must certify that they are sufficient to pay the penalty of the bond and are permanent residents of the United States. The place of residence of the sureties must also be stated. This requirement being for the benefit of the Secretary of State, he may substitute any other for it in any particular case, in order to satisfy himself of the sufficiency of the sureties.

6th. Bond to be dated.

7th. Women or persons not permanent residents of the United States will not be accepted as sureties; but by the act of August 13, 1894, a security or guaranty company which has complied with the provisions of that act is permitted to become surety on a consul's bond in lieu of individual sureties.

(Endorsed:) C. J. Solicitor of the Treasury. Mar. 31, 1905,
Received.

C. J.

Department of Justice.

Office Solicitor of the Treasury.

Washington, Mar. 31, 1905.

Examined and found legally sufficient.

[L. S.]

F. A. REEVES,
Assistant Solicitor,
C. C.

Memoranda.

June 27, 1917.—Demurrer of James Linn Rodgers, filed.

July 2, 1917.—Motion of defendant to strike out demurrer, and notice filed.

37 *Motion to Strike Out Affidavit of Merit.*

Filed July 7, 1917.

* *

Now comes the defendant James Linn Rodgers by his attorney and respectfully moves the court to strike out the plaintiff's affidavit of merit filed with his declaration herein, on the ground that this action is not an action "arising ex contractu" within the meaning of the 73d rule of this honorable court.

WILLIAM C. DENNIS,
Attorney for Defendant,
James Linn Rodgers.

George F. Curtis, Esq., Leonard J. Mather, Esq., Clinton Robb, Esq.
Attorneys for Plaintiff:

Please take notice that the above motion will be called to the attention of the court when hearing is had upon the other motions now pending in this cause.

WILLIAM C. DENNIS,
Attorney for Defendant,
James Linn Rodgers.

A copy of the above motion papers tendered this 7th day of July, 1917.

CLINTON ROBB,
Attorney for Plaintiff.

Memorandum.

July 11, 1917.—Motion to strike out demurrer overruled; motion for judgment by default overruled; motion to strike out affidavit of merit continued.

Demurrer of James Linn Rodgers.

Filed October 23, 1917.

* * * * *

1. Now comes the defendant James Linn Rodgers by his attorney and says that the first count of the plaintiff's declaration is bad in substance.

2. Now comes the defendant James Linn Rodgers by his attorney and says that the second count of the plaintiff's declaration is bad in substance.

3. Now comes the defendant James Linn Rodgers by his attorney and says that the third count of the plaintiff's declaration is bad in substance.

WILLIAM C. DENNIS,
Attorney for Defendant,
James Linn Rodgers.

38 *Matters of law Intended to be Argued as to All Counts.*

1. (a) The breaches of the defendant's consular bond alleged in the declaration are all incidents of the defendant's exercise of his judicial powers as Consul General of the United States at Shanghai, China, sitting in probate, in admitting to probate the will of one Henry H. Cunningham.

(b) The treaties and statutes of the United States and the consular regulations and instructions issued in pursuance thereof at the time the matters and things complained of are alleged to have taken place conferred probate jurisdiction upon said Consul General acting judicially.

(c) Said Henry H. Cunningham was at the time of his decease as a matter of law and fact as appears from the declaration domiciled at Shanghai, China, within the jurisdiction of the said Consul General acting judicially.

(d) The United States Consular Court in the person of the defendant as Consul General acting judicially correctly applied the law of the domicile to the settlement of the estate of the said Henry H. Cunningham.

(e) Defendant is therefore not liable to the plaintiff on account of any of his alleged actions, as aforesaid, particularly on a collateral attack by way of an action upon his consular bond.

2. The law as respects the questions of probate jurisdiction and domicile aforesaid has been settled in the sense contended for by the defendant by the consular regulations and the instructions and practice of the Department of State, thereunder, the re-

peated decisions of consular courts in China and the United States Court for China and finally has been affirmed by the Supreme Judicial Court of Maine, and has thereby become a rule of property in the extra-territorial courts of the United States affecting the interests of a large number of people in all parts of the world and will not in any event be disturbed by the courts of another jurisdiction at least on a collateral attack by way of a suit on a consular bond. See the following decisions of the United States Courts for China and the Supreme Judicial Court of Maine, several of them growing out of the settlement of the estate here in question, i. e., the estate of Henry H. Cunningham:

Re-Probate of the will of John Pratt Rodgers in the United States Court for Shanghai, May, 1907. (American Journal of International Law, Vol. 2, 1908, p. 233.)

In the matter of the probate of the will of Young John Allen, United States Court for China, Term at Shanghai, August, 1907.

Albert W. Cunningham, Administrator of the estate of Henry H. Cunningham, plaintiff, vs. James Linn Rodgers, defendant, in the United States Court for China at Shanghai, August, 1907; on appeal, Circuit Court of Appeals for the 9th Judicial District, 171 Fed. p. 836.

Mather vs. Cunningham (1910), 105 Me., 326.

3. The last will and testament of Henry H. Cunningham having been duly admitted to probate and his estate settled and administered by the Consular Court of the United States at Shanghai in accordance with the Constitution of the United States and the treaties and laws made in pursuance thereof, and the Consular regulations and instructions of the Department of State made in pursuance of said treaties and laws, all parties interested are bound and concluded thereby and any attempt to draw in question said proceedings by way of a suit on defendant's consular bond or otherwise is in violation of the defendant's rights under the Constitution, treaties and laws of the United States.

4. The defendant, a Consul General of the United States acting judicially, being a judicial officer sued for judicial acts is not liable for mere excess of jurisdiction (even if such were inferable from the allegations of the declaration, which is denied) nor unless there was clearly no jurisdiction over the subject-matter and this want of jurisdiction was known to the defendant.

5. The plaintiff is not a "person injured" by the alleged breaches of the condition of the defendant's bond within the meaning of R. S. sec. 1697.

6. The alleged unlawful and improper acts and omissions of the defendant are not the proximate cause of the injury alleged to have been suffered by the plaintiff.

WILLIAM C. DENNIS,
Attorney for Defendant,
James Linn Rodgers.

We consent to the filing of the above demurrer with an amended statement of the matters of law intended to be argued in substitution for the original demurrer filed herein.

GEORGE F. CURTIS,
CLINTON ROBB,
LEONARD J. MATHER,
Attorneys for the Plaintiff.

Memoranda.

March 1, 1918.—Demurrer to declaration sustained.

March 8, 1918.—Time to plead extended to April 5, 1918, inclusive.

Supreme Court of the District of Columbia.

Friday, April 5th, 1918.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice presiding.

* * * * *

Comes now the plaintiff by his attorney Mr. Geo. F. Curtis as the defendant James Linn Rodgers, by his attorney Mr. W. C. Carpenter and thereupon the plaintiff by his said attorney elects to stand upon his declaration to which the demurrer of said defendant James Linn Rodgers, was sustained March 1st, 1918. Wherefore, this cause is

hereby dismissed as to said defendant James Linn Rodgers
40 and it is considered that, as to said defendant, the plaintiff
take nothing by this action, that the defendant James Linn
Rodgers go hence without day, be for nothing held and recover of
the plaintiff his costs of defense to be taxed by the clerk and have
execution thereof.

From the foregoing judgment, the plaintiff, by his said attorney, in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars.

Memorandum.

April 12, 1918.—Appeal bond approved and filed.

Designation of Record.

Filed April 30, 1918.

* * * * *

The Clerk of said Court will please prepare the Transcript of Record upon appeal in the above case, as follows:

1. Declaration, Affidavit of Merit and Exhibits.
June 27, 1917.

2. Memo. of Demurrer of defendant James Linn Rodgers, filed June 27, 1917.
3. Memo. of Motion of plaintiff of July 2, 1917, to strike out Demurrer, and notice.
4. Motion of defendant to strike out plaintiff's Affidavit of Merit, and notice, filed July 7, 1917.
5. Memo. of Motion of plaintiff to strike out Demurrer, overruled July 11, 1917.
6. Memo. of Motion of defendant to strike out plaintiff's Affidavit of Merit, continued.
7. Demurrer substituted by defendant James Linn Rodgers, filed October 23, 1917.
8. Memo. of Demurrer to Declaration, etc., sustained.
9. Memo. of time to plead extended to April 5, 1918.
10. Memo. of election of plaintiff to stand upon his Declaration, etc.
11. Judgment dismissing case with costs to defendant James Linn Rodgers.
12. Memo. of plaintiff's appeal to the Court of Appeals.
13. Memo. of appeal bond approved and filed.
14. Assignment of error.
15. This designation.

LEONARD J. MATHER,
GEORGE F. CURTIS,
CLINTON ROBB,
Attorneys for Plaintiff.

Copy of this designation of record received by defendant's counsel this 29th day of April, 1918.

W. CLAYTON CARPENTER,
Attorney for Defendant.

Filed May 8, 1918.

* * * * *

The Court erred in sustaining defendant's demurrer to plaintiff's declaration, etc.

GEORGE F. CURTIS,
LEONARD J. MATHER,
CLINTON ROBB,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 64, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 60111 at Law, wherein Edward R. Cunningham is Plaintiff and James Linn Rodgers et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of May, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3185. Edward R. Cunningham, appellant, vs. James Linn Rodgers et al. Court of Appeals, District of Columbia. Filed May 29, 1918. Henry W. Hodges, clerk.

42

Monday, March 31st, A. D. 1919.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and
FRANK R. SHINN.

The argument in the above entitled cause was commenced by Mr. Clinton Robb, attorney for the appellant, and was continued by Mr. W. C. Carpenter, attorney for the appellees.

Tuesday, April 1st, A. D. 1919.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and
FRANK R. SHINN.

The argument in the above entitled cause was continued by Mr. W. C. Carpenter, attorney for the appellees, and was concluded by Mr. L. J. Mather, attorney for the appellant. On motion the appellees are allowed to file additional authorities herein.

43

Monday, October 13th, A. D. 1919.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and
FRANK R. SHINN.

A re-argument of the above entitled cause is by the Court this day ordered on the question as to whether or not the appellant has the right to maintain this action, or whether the right to do so is not exclusively in the administrator of the estate.

Per MR. CHIEF JUSTICE SMYTH,
October 13, 1919.

44

Monday, November 3rd, A. D. 1919.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and
FRANK R. SHINN.

The re-argument in the above entitled cause was commenced by Mr. Clinton Robb, attorney for the appellant, and was continued by Mr. W. C. Carpenter, attorney for the appellees, and was concluded by Mr. L. J. Mather, attorney for the appellant.

No. 3185,

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and
FRANK R. SHINN.*Opinion.*

Mr. Justice Bailey, of the Supreme Court of the District of Columbia, who sat with the Court in the hearing of this case in the place of Mr. Justice Robb, delivered the opinion of the Court:

Appellant, Edward R. Cunningham, plaintiff below, brought his action at law against the defendants, who are the principals and sureties on a consular bond to recover the penalty of such bond, \$8,000. The defendant, Rodgers, the principal on the bond, alone was served with process.

Plaintiff's declaration sounds in debt and is in three counts. To this a demurrer was interposed by the defendant Rodgers which was sustained by the lower court, and from the order sustaining the demurrer and dismissing the action, the plaintiff has appealed.

The defendant was the Consul General of the United States at Shanghai, China. On June 10, 1905, one Henry H. Cunningham died in Shanghai, leaving no wife, and no heirs or next of kin in China, but leaving a brother, the plaintiff, a resident of the District of Columbia, and another brother and two sisters residing in Maine, where, the declaration avers, the deceased was legally domiciled at the time of his death. A paper writing purporting to be the will of the deceased was produced before the defendant consul by the person nominated as executor therein, one Dunning, and this paper the consul admitted to probate and issued letters testamentary to Dunning. Thereupon, under the direction of the defendant, the estate was administered and the property, including the real estate, distributed according to the terms of the alleged will. The declaration avers that this will was not valid under the laws of Maine, the testator's domicile, having only two witnesses, while the laws of that State require three witnesses, that the defendant consul had no jurisdiction to admit the will to probate nor to administer on the estate, but that it was his duty, immediately after the death of Henry H. Cunningham, for the information of the representatives of the deceased, to notify his death in one of the gazettes published in the Consulate, and also to the Secretary of State, and to send to the Secretary of State an inventory of the deceased's effects, and to transmit the decedent's estate to the Treasury of the United States, after payment of debts (which was not done), unless the legal representative of the deceased, duly qualified before a court of proper and competent jurisdiction in the United States, had appeared and proven his right to have the estate turned over to him; but that Dunning had

never so qualified. The plaintiff received no part of the estate although he claims that the deceased died intestate and that he, as one of the next of kin, was entitled to a one-fourth distributive share, the same amounting to more than \$8,000, the penalty of the Consular bond.

The plaintiff relies for his relief upon section 1709 of the Revised Statutes. This section is as follows:

"It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings."

The first question presented is whether the plaintiff has any right of action on this bond or whether such right is in the personal representative of the decedent alone. It is true that section 1697 of the Revised Statutes provides that in case of the breach of an official bond such as the one sued on here, "any person thereby injured may institute in his own name and for his sole use, a suit on such bond," but this merely obviates the necessity of bringing suit in the name of the United States for the use of the person injured, and has no bearing on this question.

At the common law (which prevails in the District of Columbia) real estate descends to the heir upon the death of the ancestor and personality to the administrator. No title to personality vests in the next of kin upon the death of the ancestor but it remains in abeyance until the appointment of an administrator in whom it then vests.

1 Woerner on Adm., sections 185, 187, 199, 202.

The title to the personality, therefore, being in the administrator, he alone can bring an action at law for its recovery, or to collect debts due his intestate, and he alone can sue for any injury to the personal property of his intestate after the decedent's death and

before the final disposition to the parties entitled. *Id.* sections 303, 293; *Holbrook v. White*, 13 Wendell, 591; *Hutchins v. Adams*, 3 Maine, 174; *McBride, v. Vance*, 73 Ohio St., 258; 112 Am. St. Reports, 723, and notes.

This is an action at law and it results therefore that it can not be maintained by the plaintiff as owner of a distributive share in the estate nor for any injury to or conversion of such interest.

Under paragraph fifth of R. S. 1709, it is provided that it is the duty of the Consul "to transmit the balance of the estate to the Treasury of the United States to be held in trust for the legal claimant, etc." The legal claimant is clearly the personal representative and such has been the construction placed upon this section by the Treasury Department. 11 Comptroller's Dec., 713; 12 *Id.*, p 439.

If therefore the consul had performed the duties which the plaintiff claims it was incumbent upon him to perform, the administrator would be the legal claimant and he alone would have been entitled "to receive the fund from the Treasury."

The declaration is not framed so as to charge the defendant as an *executor de son tort*, nor could such an action be maintained by the next of kin. 2 Woerner on Adm., sec. 193; *Lee v. Wright*, 1 S. & R., 149; *Muir v. Trustees*, etc., 3 Barb. Chy., 477; *Leach v. Pillsbury*, 15 N. H., 137.

46 As to the disposition of the real estate it is sufficient to say that no action of the defendant can prevent the plaintiff from establishing his just rights in the proper forum, as the land can not have been dissipated by the defendant.

In no aspect of the case therefore can the plaintiff maintain this action. The action of the Supreme Court of the District of Columbia in sustaining the remurrer and dismissing the suit was correct and the judgment of said court will be affirmed with costs.

Monday, March 1st, A. D. 1920.

January Term, 1920.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and FRANK R. SHINN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and

adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice BAILEY,
March 1, 1920.

(Mr. Justice Robb did not sit in this case.)

48 In the Court of Appeals of the District of Columbia,

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, Appellee.

Motion for Allowance of a Writ of Error to U. S. Supreme Court.

Comes now the Appellant, Edward R. Cunningham, (plaintiff below), and in the above captioned case, by his attorneys, prays a Writ of Error from the decision of this Honorable Court, to the Supreme Court of the United States, upon the grounds enumerated below, and further, that this Honorable Court fix the amount of bond to operate as a supersedens.

1. That the jurisdiction of the trial court, and therefore the action of this Honorable Court in sustaining the demurrer filed below, is in issue.
2. That it is a case involving the construction and application of the Constitution of the United States, the laws of the United States of general application, and the validity and construction of treaties made under authority of the Constitution of the United States.
3. That it is a case where the existence and scope of the powers and duties of a consul general of the United States are drawn in question, under the laws of the United States.

LEONARD G. MATHER,
CLINTON ROBB,
GEO. F. CURTIS,
Attorneys for Appellant.

(Endorsed:) No. 3185. Edward R. Cunningham, appellant, vs. James Linn Rodgers, appellee. Motion for allowance of writ of error to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Mar. 16, 1920. Henry W. Hodges, Clerk.

49

Wednesday, March 17th, A. D. 1920.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and FRANK R. SHINN.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States. It is ordered by the Court that said writ issue as prayed, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

50 UNITED STATES OF AMERICA, ~~RE:~~:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Edward R. Cunningham, Appellant, and James Linn Rodgers, Andrew Denny Rodgers, and Frank R. Shinn, appellees, a manifest error hath happened, to the great damage of the said Edward R. Cunningham, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of April, in the year of our Lord one thousand nine hundred and twenty.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

— — —

(Bond on Writ of Error.)

Know all men by these presents, That we, Edward R. Cunningham, as principal, and U. S. Fidelity & Guaranty Company, as surety, are held and firmly bound unto James Linn Rodgers in the full and just sum of Three hundred Dollars (\$300) to be paid to the said James Linn Rodgers, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of April, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Edward R. Cunningham, Appellant and James Linn Rodgers, Appellee, a judgment was rendered against the said Edward R. Cunningham and the said Edward R. Cunningham, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Linn Rodgers citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty day from the date thereof:

Now, the condition of the above obligation is such, That if the said Edward R. Cunningham shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD R. CUNNINGHAM. [SEAL.]

By His Attorneys,
GEORGE F. CURTIS. [SEAL.]
CLINTON ROBB. [SEAL.]
LEONARD J. MATHER. [SEAL.]

[Seal of the United States Fidelity & Guaranty Company.]

UNITED STATES FIDELITY &
GUARANTY COMPANY,
By LOUIS L. PERKINS, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of—

HELEN E. WILLIAMS.
I. M. WHITE,
As to Surety.

Approved by—

CONSTANTINE J. SMYTH,
*Chief Justice Court of Appeals of the
District of Columbia.*

[Endorsed:] No. 3185. Edward R. Cunningham, Appellant, v. James Linn Rodgers et al. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed April 26, 1920. Henry W. Hodges, Clerk.

52 UNITED STATES OF AMERICA, *ss:*

To James Linn Rodgers, Andrew Denny Rodgers, and Frank R. Shinn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Edward R. Cunningham is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smith, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of April, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,
*Chief Justice of the Court of Appeals
 of the District of Columbia.*

Service acknowledged April 27th, 1920.

W. C. DENNIS,
Of Counsel for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 27, 1920. Henry W. Hodges, Clerk.

53 In the Court of Appeals of the District of Columbia.

No. 3185.

EDWARD R. CUNNINGHAM, Appellant,

vs.

JAMES LINN RODGERS, Appellee.

Assignments of Error.

1. The Court erred in holding that the suit had not been brought by the proper party plaintiff.

2. The Court erred in sustaining defendant's demurrer to plaintiff's declaration, etc.

GEORGE F. CURTIS,
 CLINTON ROBB,
 LEONARD J. MATHER,
Att'ys for Appellant.

[Endorsed:] In the Court of Appeals of the District of Columbia, No. 3185. Edward R. Cunningham, Appellant, vs. James Linn Rodgers, Appellee. Assignments of Error. Court of Appeals, District of Columbia. Filed Apr. 26, 1920. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages numbered from 1 to 53 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Edward R. Cunningham, Appellant, vs. James Linn Rodgers, Andrew Denny Rodgers, and Frank R. Shinn, No. 3185, January Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of April, A. D. 1920.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the
District of Columbia.*

Endorsed on cover: File No. 27,654. District of Columbia Court of Appeals. Term No. 321. Edward R. Cunningham, plaintiff in error, vs. James Linn Rodgers, Andrew Denny Rodgers, and Frank R. Shinn. Filed May 4th, 1920. File No. 27,654.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 321.

EDWARD R. CUNNINGHAM, *Plaintiff in Error*
vs.

JAMES LINN RODGERS, ANDREW DENNY RODGERS, and
FRANK R. SHINN.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in Error, Edward R. Cunningham, plaintiff below, brought an action at law against the defendants, respectively the principal and sureties on a Consular Bond, to recover its penalty of \$8,000.

The action is grounded upon Section 1697 of the Revised Statutes (as amended by Act of December 21, 1898, 30 Stat. L., 770), and Section 481 of the Code of Law of the District of Columbia.

Plaintiff in Error's Declaration, sounding in debt, is in three counts and is supported by an affidavit of merit.

Defendant, James Linn Rodgers, was the only party

served, so that the other defendants are not before this court.

General demurrer was interposed by the defendant, together with a motion to strike out plaintiff in error's affidavit of merit.

The Trial Court sustained the demurrer, without assigning any reason for so doing or rendering a written opinion; but no action was taken on defendant's motion to strike out plaintiff in error's affidavit of merit.

The Court of Appeals of the District of Columbia affirmed the decision of the trial court upon the sole ground,—suggested by itself,—that the suit should have been brought by an administrator rather than by plaintiff in error as an individual.

The question presented by the Declaration and demurrer thereto may be briefly stated as follows: Could the defendant Rodgers, as American Consul General at Shanghai, China, *legally* administer upon and exercise probate powers over the estate of plaintiff in error's brother, who died at Shanghai and whose property was there located; or were defendant's powers *limited* to the conservation of that estate and transmission of it to the Treasury of the United States, there to be held in trust for the legal claimants?

The Declaration by its FIRST COUNT (R., 1-21), after averring that plaintiff below is a citizen of the United States and a resident of the District of Columbia, charges that the defendant Rodgers, as Consul General of Shanghai, assumed as such the judicial power and authority of a probate court and usurped the functions and jurisdiction of such a superior court, when he unlawfully admitted to probate and record as the Will of decedent Cunningham a certain paper writing, void upon its face as a Will, and afterwards took it upon himself to administer and distribute the estate of the said decedent Cunningham in such manner as

that plaintiff was deprived of his property interest therein:

That when so doing, June 10, 1905, the defendant Rodgers was acting as Consul General of the United States at Shanghai, China, he having given the bond in suit in the penalty of \$8,000, as required by Sections 1735 and 4110 of the Revised Statutes of the United States, conditioned for the faithful discharge of his duties as such Consul General (R., 2) :

That the consular duties of the defendant with respect to estates of citizens of the United States dying within his consular district were enjoined upon him by Sections 1709, 1710 and 1711 of the Revised Statutes of the United States, and by the Consular Regulations of 1896, which limited defendant's power over such estates to that of conservation and transmission of the net assets, after payment of legal debts, to the Treasury of the United States, the defendant having no probate jurisdiction (R., 3, 4) :

That on said June 10, 1905, plaintiff's brother, Henry H. Cunningham, "a citizen of the United States," died within defendant's consular district at Shanghai, leaving there personal property of the value of over \$50,000, but no widow, children, father, mother, or heirs at law in China, although leaving in the United States, as his sole heirs at law and next of kin, his brother, plaintiff in error, then and now a resident of the District of Columbia, and two sisters and another brother, then living and domiciled in the State of Maine. Of these four heirs at law, only plaintiff, and one sister, domiciled in Maine, were living when the suit was filed in March, 1917 (R., 7, 14) ;

That three days after Henry H. Cunningham died in Shanghai, one Dunning, a stranger, brought to the United States Consulate there a paper writing which was alleged to be decedent's Will. This writing had only two witnesses, while the laws of Maine required three (R., 7) ;

That decedent Henry H. Cunningham was "a citizen of

the United States and legally domiciled in Belfast, Waldo County, State of Maine," and "always claimed and referred to the same as his home and always evidenced an intention of there returning, and decedent himself, in this alleged Will declared that he was "of Belfast, Maine, U. S. A., and residing in China," while the Petition for probate, signed by said Dunning, referred to decedent as "Henry H. Cunningham, a citizen of the United States, residing at Shanghai, China," etc. (R., 9, 12); and

That although defendant had no probate power in any event over the estate of decedent Cunningham, and was under positive instruction to transmit that estate to the Treasury of the United States, there to be legally distributed, defendant admitted said paper writing to probate and record as a Will of both real and personal property, and thirteen days after filing the Petition therefor, issued Letters of Administration thereunder (R., 14) to the said Dunning, (the very Letters referring to decedent as "a citizen of the United States—R., 14) and without legal authority proceeded to administer upon said estate by making final distribution thereof in paying various sums to claimants in China under said alleged Will and by paying Mrs. Mather, one of decedent's next of kin, in Maine about \$40,000, so that plaintiff was deprived of his entire one-fourth interest in said estate (R., 15, 16, 17, 18), whereby, and because said defendant failed to transmit said estate "to the Treasury of the United States" as required by law, and as no "legal representative of the deceased" appeared in Shanghai, China, to demand the effects of the decedent, and because said defendant failed to properly notify the death of decedent, and likewise failed to transmit to the Secretary of State any inventory of the effects of the deceased, as required by Section 1710 R. S. U. S. (R., 19), and again failed in his duty by usurping jurisdiction to administer said

estate and departed from the "usage" established by the U. S. Consuls (R., 20, 21), he breached his Consular bond, while the

SECOND COUNT (R., 21-23) charges in addition to the aforesaid wrong doing, that the defendant ordered Dunning, the pretended executor under said paper writing, to convey to a certain Mrs. Green, gratuitously and without consideration, realty in Pao Shan District in Shanghai of the value of \$5000, which was then outstanding in decedent Cunningham's name in the Land Records of the United States Consulate at Shanghai, when no such real estate was devised, or sought to be devised, even under the pretended Will of said decedent Cunningham (R., 22, 23) and the

THIRD COUNT (R., 23-25), after reciting as in the former counts, charges that when decedent Cunningham, a citizen of the United States and domiciled in Maine died, without legal representative, partner in trade or trustee by him appointed to take care of his effects, and leaving no widow, heirs at law and next of kin in China, although leaving two brothers and two sisters in the United States,—with all of which said defendant was charged with both actual and constructive notice—he failed to notify plaintiff of what was intended to be done about probating the alleged Will, as he was required to do under Section 1710 R. S. U. S. (R., 25), and further violated the condition of his said Consular bond by going through with a pretended form of administration on said estate, whereby plaintiff was deprived of his proper distributive share therein (R., 25).

ASSIGNMENTS OF ERROR.

1. The Court erred in holding that the suit had not been brought by the proper party plaintiff.
2. The Court erred in sustaining the demurrer to the Declaration.

POINTS OF LAW TO BE DISCUSSED.

This case naturally falls into three general divisions for discussion, which will be treated in the order given.

I.

PLAINTIFF IN ERROR WAS A PROPER PARTY PLAINTIFF BELOW, AND THEREFORE ENTITLED TO MAINTAIN THIS ACTION.

II.

CONGRESS POSSESSES NO POWER OR AUTHORITY TO CONFER STRICT PROBATE POWERS OF ADMINISTRATION UPON A CONSUL OR CONSULAR COURT, OR ANY OTHER FEDERAL OFFICER OR COURT; SUCH POWER BEING INHERENTLY AND CONSTITUTIONALLY RESERVED TO THE SEVERAL STATES.

III.

NEITHER THE STATUTES OF THE UNITED STATES, NOR ANY TREATY, LOCAL LAW OR USAGE, ATTEMPTED TO CONVEY SUCH PROBATE POWERS UPON THE CONSULAR COURT AT SHANGHAI, CHINA, OVER THE ESTATES OF AMERICANS DYING THERE, TESTATE OR INTESTATE, AND DEFENDANT'S ILLEGAL EXERCISE OF SUCH POWER BREACHED THE BOND IN SUIT.

ARGUMENT.

I.

Plaintiff in Error Was a Proper Party Plaintiff Below, and Therefore Entitled to Maintain This Action.

The trial Court determined adversely to plaintiff's contention without reason given; the Court of Appeals determined the same way on the point raised of its own volition, viz: That the suit could have been brought only by an administrator.

So that before again reaching the merits on this appeal, it becomes necessary to take up and dispose of this contention of an improper party plaintiff in error.

Suit was brought under Section 1697 of the Revised Statutes of the United States (enacted August 18, 1856), as amended by Section 1 of the Act of December 21, 1898 (Ch. 36, 30 Stat. L., 770), which reads in part as follows:

"In case of a breach of any such bond (referring to bonds of Consul Generals, Consuls, and Commercial Agents) any person thereby injured may institute, in his own name and for his sole use, a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form; but if such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, and the United States shall in no case, be liable for the same. The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by a breach of the condition of the same until the whole penalty has been recovered; and the proceedings shall always be as directed in this section."

and if that Statute could mean other than it says, then, perforce, under Section 481 of the Code of Laws of the District of Columbia, which provides:

"Whenever a bond is executed to the United States by any fiduciary or public officer, conditioned for the performance of certain duties, in the performance of which private persons are interested, any such person, aggrieved by a breach of such condition shall be entitled to maintain an action thereon in his own name against the obligor and his sureties to recover damages for the injury suffered by him in consequence of such breach; and it shall be the duty of the custodian of such bond to furnish a certified copy thereof to said party for the purpose aforesaid on payment of the legal fees therefor."

It is said by the Court of Appeals, "It is true that section 1697 of the Revised Statutes provides that in case of the breach of an official bond such as the one sued on here, that 'any person thereby injured may institute in his own name and for his sole use, a suit on such bond.'"

One might well believe this language to be sufficiently plain, direct and unequivocal as to show that Congress intended it to apply to just such cases as the one at bar, without seeking other or more convincing evidence of this all too plain intention; for hardly could the English language be phrased to a clearer or more manifest intent.

Yet the learned Court of Appeals legislates this language was used solely to "obviate the necessity of bringing suit in the name of the United States for the use of the person injured."

If the administrator had been the proper party plaintiff in this case, however, then certain it is, that under no consideration could he have been the one "injured" by the unlawful and improper acts of this defendant in error.

Moreover, just as certain is it that such administrator could not institute suit "in his own name," but could sue *only* in his representative capacity, and *only* in his representative name as such administrator.

Finally, no administrator could sue for his "sole use," when by virtue of his office he alone can sue to the use of "others."

We are in entire accord with the proposition laid down by the Court of Appeals that in the District of Columbia (without enabling statute) "real estate descends to the heir upon the death of the ancestor and personalty to the administrator;" but if section 1697 R. S. U. S., indeed, could mean other than it says, and does not give a right to the party "injured" to sue "in his own name and for his sole use," section 481 of the District Code would hardly have been enacted several years later in slightly varying language but substantially to the same effect, and for the same identical purpose in local use.

These important words in the statute have an exact judicial signification, for in the universal statutes giving to assignees of all choses in action the right to sue in their own name, judicial interpretation and determination has long since settled their meaning. So, it is not as if the legislators were experimenting with words whose meaning was yet unknown to them. Neither is it likely that they selected this method of expression when intending and wishing to write something on the statute books entirely different.

As one views the parallel legislation concerning consuls general, their rights and duties and their civil responsibilities and liabilities, as contra distinguished from their answering to the sovereignty of the United States for malfeasance in office, this question is made even the easier for answer.

Section 1697 R. S. U. S., enacted in 1856, was silent as

to a right of action on the bond. Whether there existed a common law right of action therefor need not be determined, though the language of the Supreme Court in Howard vs. United States, 184 U. S., 646, is at least significant as indicating the marked tendency of that Court broadly to construe and extend rights of action upon the bonds of public officials.

In Section 1735 R. S. U. S., however, enacted on the same day, Congress provided that suits thereon for the willful or fraudulent acts of the consul, should be in the name of the United States for the use of the person injured, thus reserving to the United States supervision over suits involving criminal acts and therefore vitally concerning the sovereign.

Having thus reserved this right, Congress later said by way of amendment to Section 1734 R. S. U. S. (30 Stat. L., 771), that the demand for the restitution of embezzled property might be made "by the Secretary of State or by such (United States) citizen, his executor, administrator, or legal representative."

Why should Congress thus refer to the individual, and so limit it, in the one case, and extend it to that of the representative in the other, unless it intended to make clear just that very distinction: To narrow the rights to the one; to enlarge them as to the other?

Why should Congress say that when suit be brought on the bond of a consul for his negligent acts and mistakes under section 1697 R. S. U. S., as amended, it should be instituted by "any person thereby injured" and "in his own name and for his sole use," and moreover, by the concluding words of said amendment—"and the proceeding shall always be as directed in this amendment"—limit such right to this course of action by prohibiting any other, if it intended that right to be enforced only by the administrator, when,

at the same writing, and where the offense was a willful and fraudulent one against the sovereignty of the United States (as covered by sections 1734 and 1735 R. S. U. S., as amended), it sought to accomplish the same result by enlarging the right of demand for the return of embezzled property to "the Secretary of State or by such (United States) citizen, his executor, administrator or legal representative?"

Could it be that, desirous of intending the same remedy concerning practically the same subject matter and expressing itself as to both at the same time, Congress could best evidence such intention by using phraseology and language in the one case the exact antithesis of that used in the other?

Further, the language of said amendment to said section 1697 R. S. U. S., should remove any possible doubt as to the legislative intent, for, reciting that "the said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by a breach of the condition of the same until the whole penalty has been recovered," such language can only mean that the "person * * * injured" is the individual and not a representative; because any administrator would necessarily represent all the parties and if, representing all the parties, suit be brought, a judgment would obviously take for all and there would, of course, be no necessity to have the bond "remain after * * * judgment * * * as * * * security" for anyone else.

Nor is the foregoing the only evidence of the deliberate intention of Congress to give a personal right of action to a person injured by a breach of a consular bond, rather than to the administrator of decedent. In 1902 Congress passed an Act (32 Stat. L., 546) requiring a consul to give bond for the performance of his duties in the "settlement or conservation of estates under appointment from any foreign

state," thus providing for every contingency in which a consul might take possession of the property of a deceased countryman. The right to sue upon such a bond was given, exactly as on the bond required by Sec. 1697 R. S. U. S., and here in suit, to "any person injured * * * in his own name and for his sole use."³

Thus, throughout this legislation, do we find the clear intent to distinguish between the rights of the individual and those of the administrator or legal representative, just as clearly evidenced by the language actually set out in the respective statutes.

The learned Court of Appeals further in consideration of this point says:

"Under paragraph fifth of R. S. 1709, it is provided that it is the duty of the Consul "to transmit the balance of the estate to the Treasury of the United States to be holden in trust for the legal claimant, etc." The legal claimant is clearly the personal representative and such has been the construction placed upon this section by the Treasury Department. 11 Comptroller's Dec. 713; 12 Id., p. 439.

If therefore the consul had performed the duties which the plaintiff claims it was incumbent upon him to perform, the administrator would be the legal claimant and he alone would have been entitled "to receive the fund from the Treasury."

Of course such "legal claimant" would be the personal representative of the decedent.

The learned Court apparently has wholly failed to distinguish between the claimant for the entire fund for proper subsequent distribution among all those entitled, and the claimant who seeks to recover the penalty under a breached bond in order to cover, in part at least, that of which he has been illegally deprived, and as to which he alone is au-

thorized under the statute to sue for as the "party thereby injured."

If this money had been transmitted to the Treasury of the United States, as required by law, plaintiff in error would have been fully protected, for the "claimant" would then have collected his share, as well as the shares of the other next of kin; instead of which, and by means of the complained of illegal distribution, decedent's personal estate went to but one of them, and consequently the plaintiff in error was the "person thereby injured."

As to the illegal disposition of the real estate, the learned Court says:

"As to the disposition of the real estate it is sufficient to say that no action of the defendant can prevent the plaintiff from establishing his just rights in the proper forum, as the land can not have been dissipated by the defendant."

So, with but scant ceremony is dismissed plaintiff in error's right to sue upon the bond for breach thereof because of the illegal disposition by the defendant of the real estate of the decedent Cunningham valued at \$5,000; whereby, certain it is that plaintiff in error was one of the "persons thereby injured." The effect of this ruling by the Court of Appeals would be to require plaintiff to go to the other side of the world, where this land lies, and there seek relief; although the very purpose of Congress, in providing for service of process upon Consuls through the Treasury in suits of this character, was to enable an injured party to obtain redress in his home jurisdiction.

In conclusion of the point under discussion, and to demonstrate the utter fallacy of the learned finding of the Court of Appeals thereon, let us put the matter to a practical test.

Decedent Cunningham left four persons surviving him

as his only heirs at law and next of kin. One of them, Mrs. Mather, rightfully or wrongfully, received the entire personal estate, to the exclusion of the others. Two of them, Mrs. Mather and her sister, were agreeable to such distribution. The remaining two—one the present plaintiff in error—were unwilling. An administrator would necessarily represent all four. Scarcely could he bring suit for breach of bond on behalf of the favored distributee. She had no ground for complaint. She was not an "injured" person. Neither could he bring suit for the one dissatisfied group, or alone for the present plaintiff in error. The law does not permit an administrator either to select some of those entitled to the exclusion of others, or allow him afterwards to distribute to the favored and thus selected few.

Can it be that the legislators had it in mind to defeat the apparent purpose of their legislation?

Could it be that the law could have stood thus long on the statute books, self destructive in its very nature?

What an anomaly!

II.

Congress Possesses no Right, Power or Authority to Confer Strict Probate Powers of Administration Upon a Consul or Consular Court, or Any Other Federal Officer or Court; Such Power Being Inherently and Constitutionally Reserved to the Several States.

When the framework of our Government was welded together by the Fathers, there was granted to the Federal Government certain delegated powers. What were not thus granted by the States were specifically reserved and, as to such, each State retained its own sovereignty. Probate power—the right of administering upon the estates of de-

cedents, with the right to contest before a jury of one's peers the question of proper distribution of any decedent's property—was jealously guarded as an inherent and inalienable right. Thus bosomed, how can it be pretended, or successfully contended, that a consul could arbitrarily abrogate such right?

In O'Callaghan vs. O'Brien, 199 U. S., 89, 110, where the question was as to the validity or non-validity of a nuncupative will, admitted to probate and record by the Washington State Court without the giving of the statutory notice to the next of kin, the Supreme Court, speaking through Mr. Justice White, said:

"As the authority to make Wills is derived from the State, and the requirement of probate is but a regulation to make a Will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."

So, too, the case of Garzot vs. Rios De Rubio, 209 U. S., 283, 302, came to the Supreme Court of the United States on the question of the probate jurisdiction of the Porto Rican courts, and whether the District Court of the United States for the District of Porto Rico had jurisdiction of a bill which sought to administer a decedent's estate, and the court, when speaking to the point through Mr. Justice White, again said:

"In creating * * * the district court of the United States for Porto Rico, the jurisdiction and power of that court, we think by the very terms of the act, were clearly fashioned upon and intended to be made, as far as applicable, like unto the jurisdiction exercised by the circuit and district courts of the United States within the several states of the Union. It is true that the jurisdiction of the district court, resulting from citizenship, has been made broader than that conferred

upon the circuit and district courts of the United States within the states. But this does not tend in any way to establish that it was the purpose of Congress, in creating the district court of the United States for Porto Rico, to endow that court with an authority not possessed by the courts of the United States (*Farrell vs. O'Brien*), (*O'Callaghan vs. O'Brien*), (199 U. S. 89, 50 L. Ed. 101, 25 Sup. Ct. Rep., 727), to exercise purely probate jurisdiction to administer and settle estates, in disregard of the authority of the local court, as created and defined by law."

Again, as was said by Mr. Justice Day in *Rocca vs. Thompson*, 223 U. S., 317, 329, where the question was whether the most favored nation clause in the Italian treaty gave the right to an Italian Consul General to administer the estate of an Italian citizen dying intestate in California to the exclusion of the one authorized by the local law to administer the said estate:

"There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the National Government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the states, and to commit such administration to the Consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance."

In *re Servas* (1915) 169 Cal. 240, 146 Pac., 651, Ann. Cas. 1916D, 233, it is said:

"It is a vexed question whether power resides in the Federal government, by treaty or otherwise, to abridge the rights of the states over the administration of estates of persons dying and leaving property within their territorial jurisdiction; whether exclusive jurisdic-

tion over that subject is not a right reserved to the states, with which the Federal Government may not interfere. We mention this, not that we consider the question of such power involved here, but to point out that, in the absence of any determination of that question by the Supreme Court of the United States, it has been the declared policy of the Federal government not to interfere by treaty with the laws of the states in the matter of the administration of estates of deceased persons. Mr. James G. Blaine, as Secretary of State, writing to Mr. Abbott in 1890 (For Rel. of the U. S. 1890, p. 255) relative to a provision of the Treaty of 1850 between our government and New Granada (now the United States of Columbia), which provided that consuls of the contracting parties might take possession of and sell the property of residents of their nation who might die in the country where the consul resides, said: "The only exception to the exercise of this power is found in the provision that "consuls shall not discharge this function in those states whose peculiar legislation may not allow it." The reason and effect of these provisions are clear. In the United States, just as was formerly the case in Colombia, legislative power in respect to the settlement of estates is vested in the several states. It has always been controverted whether the exercise of this power could constitutionally be controlled by the government of the United States, either by law or treaty. In order to meet this difficulty it was provided by the present treaty that consuls should not exercise the function of settling estates in states where "peculiar legislation" might not allow it. The term, "peculiar legislation," means simply legislation of particular political divisions of the country possessing legislative power with respect to the subject-matter. The term, "those states," was also obviously employed in reference to the same political divisions, and could not have been used in reference to the contracting governments." Mr. Bayard, when Secretary of State, in answer to the proposition that consuls of the United States and of Brazil, respectively, be conceded the privilege of taking out letters of administration in certain

cases, declared in 1889: 'Each state, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens, dying within its limits.' Mr. Uhl, acting Secretary of State, in response to a note from the Italian ambassador, proposing that the consuls of Italy in the United States be authorized to settle the estates of subjects of Italy dying in this country, wrote in 1894: 'In reply I beg to say that the United States has never entered into any treaty granting to the consuls of foreign countries in this country such authority as that you suggest should be given to the consuls of Italy. The entire question of the administration, settlement, and distribution of decedents' estate in this country is under the control of the respective states. * * * These considerations compel me, though with much regret, to dissent from the opinion entertained by you that the Italian consuls should, by international agreement, be given the authority you demand for them.' The power of our consuls to take charge of the effects of American citizens dying abroad in their jurisdiction is confined to the cases 'where the laws of the country permit.' 1 Stat. L. 255 Chap. 24, Sec. 2, Comp. Stat. Sec. 31^c2, 3 Fed. Stat. Anno. 2d Ed. p. 30."

The extent of the treaty-making power received some consideration in *Re D'Adamo* (1914) 212 N. Y. 214, L. R. A. 1915D, 373, 106 N. E. 81, in which the court, in holding that the treaty provisions and state statutes were not in conflict, said:

"The construction which we thus hold to be the true one finds additional confirmation when we consider the respective fields of state and national legislation, and the refusal of the Federal government, as disclosed in our diplomatic history, to trench upon the right of the states to administer the estates of those dying within their territorial limits."

* * * * *

"We find, however, that distinguished Secretaries of

State had disclaimed both the existence of such a power and the intent to exercise it. Thus, in 1874, Mr. Fish, in a letter to the Turkish minister, said: 'The estates of decedents are administered upon and settled in the United States under the law of the state of which the decedent was a resident at the time of his death, and on this subject, in the absence of any treaty regulations on the subject, interference in the disposition of such measures as may be prescribed by the law of the particular state in such cases is not within the province of the Federal authorities.' Again, in 1889, Mr. Bayard, in a letter to the American minister in Brazil, considered a decree of the Brazilian government establishing the principle of reciprocity, with reference to the administration of the estates of deceased aliens by their consular representatives; and, criticizing the principle of the decree, he said (5 Moore, International Law Dig. p. 120): 'The government of the United States has no power to establish by treaty, provisions such as the above in relation to Brazilian subjects dying in any of the states of our Union. Each state, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens, dying within its limits. * * * I conclude, therefore, that the United States cannot agree to accept the Brazilian decree, above quoted, as the basis of a reciprocal arrangement with that country: First, because the Federal government has no power to impose such regulations on the states; and, secondly, because the provisions in question, if correctly understood, conflict with provisions which are settled rules of succession, as established in all states.' Again, in 1894, the Italian minister at Washington proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen.

5 Moore, International Law Dig. p. 122;

Rocca vs. Thompson (1912) at page 333 of 223 U.S., 56 L. Ed., 459, 32 Sup. Ct. Rep. 207.

"The Department of State replied that, in view of

the fact that the administration of estates in the United States was under the control of the respective states, it was thought that the proposed international agreement should not be made. Other instances of the expression of a like policy are cited in the briefs of counsel. We call attention to these precedents, not as disproving the power of the Federal government, by virtue of its control over our international relations, to enlarge the functions of consuls in the administration of the estates of aliens, but rather as demonstrating the propriety of a construction of the treaty power so frequently disclaimed. *It is not to be lightly presumed that the government of the nation departed from the precedents of a century, and, by an obscure clause in a long and involved article of this convention, overturned its settled practice.*" (Our italics.)

In *Pagano vs. Cerri* (1916) 93 Ohio St. 345, L. R. A. 1917A, 486, 112 N. E. 1037, it is said:

"At the very threshold of the case we are met with a distinct challenge as to the power of the national government, in the exercise of its treaty-making function, to invest the consuls of any foreign nation with the sole, prior, and paramount right to administer upon the estates of their deceased fellow countrymen, anything in the laws of the several states of the Union to the contrary notwithstanding. There is no Federal holding to the effect that the national government can constitutionally exercise any such sweeping power; indeed, within the last four years the Supreme Court of the United States itself questions the right of the Federal government to enter into any such engagement with a foreign power.

See *Rocca vs. Thompson* (U. S.), *supra*.

"While this is a question of power rather than policy, yet we feel that public policy whether looked at from a national or a state standpoint, would forbid the exercise of such a power. * * * The Constitution of the United States does reserve to the exclusive domain

of the Executive and the United States Senate the treaty-making power, yet this grant to the Federal government and the denial to the several states has its limitations of power. A treaty duly ratified has no more binding force than an act of Congress generally, and, as to its subject-matter, clearly it cannot overstep the limitations of the Federal Constitution. It would manifestly be beyond the power of the United States government to provide by treaty with Italy that subjects of Italy, residents of Ohio, should be entitled to exemption from execution for debts for an amount in excess of that granted citizens of Ohio, or to provide that such subjects should be entitled to obtain a divorce on the ground of desertion or wilful absence for one year, whereas to other citizens the right was limited to absence for three years. The administration of the estate of the deceased inhabitants of a state is peculiarly a state, and not a Federal, matter, and many of our most distinguished Secretaries of State for the United States have always recognized it as a state affair. * * * Such a uniform construction of its own limitation of power by the Federal government, existing for so long a period of time, is certainly tantamount to a declaration that the several states have, under the 10th Amendment to the Federal Constitution, the reserved right to regulate the matter of the administration of the estates of aliens dying intestate within their jurisdictions as a strictly domestic concern."

See to the same effect:

Board of Public Works vs. Columbia College, 17 Wall., 521.

Tarver vs. Tarver, 9 Pet., 174.

Fouvergne vs. City of New Orleans, 18 How., 470.

Ellis vs. Davis, 109 U. S., 485.

In re Frazer, Fed. Cas. No. 5068.

It would seem plain, therefore, that no power ever was conferred upon this defendant to administer and distribute decedent Cunningham's estate, or to do aught but what the

statutes authorized; namely, conserve and transmit to the United States for proper and legal distribution according to the laws of decedent's domicil. Accordingly, when he arbitrarily assumed such power, he breached his bond.

III.

Neither the Statutes of the United States, Nor Any Treaty, Local Law or Usage, Attempted to Convey Such Probate Powers Upon the Consular Court at Shanghai, China, Over the Estates of Americans Dying There, Testate or Intestate, and Defendant's Illegal Exercise of Such Power Breached the Bond in Suit.

(a) *Statutes.* Taking the statutes up first for consideration, we find that this honorable Court already has determined the question. In *Rocca vs. Thompson*, 223 U. S., 317, 327 (56 L. E. 453, 456), involving the right of an Italian Consul General to administer the estate of an Italian citizen dying intestate in California, U. S. A., under the most-favored nation (Argentine) treaty clause which conferred upon consular officers of the respective countries, as to citizens dying intestate, the power "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs" (a power apparently much broader than that afforded this defendant by either treaty or statute), it was held that the Consul had not the right to administer upon the decedent's estate, and that no power of "administration" was conferred, the Court saying:

"But these instructions (referring to the instructions of Secretaries of State, as the same appeared for consideration in the record of the Lobrasciano case, em-

phasizing the right and duty of consuls to administer upon the effects of citizens of the United States, dying in foreign lands) must be read in the light of the statute of the United States, Section 1709, U. S. Comp. Stat. 1901, p. 1179, which, while it recognizes the right of consuls and vice-consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, leaving there no legal representative, partner, or trustee, to inventory the same, and to collect debts, provides in the fifth paragraph of the section that if, at any time before the transmission to the United States Treasury of the balance of the estate, the legal representative appears and demands his effects in the hands of the consul, they shall be delivered up, and he shall cease further proceedings, and the duties imposed are where 'the laws of the country permit.'

The consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law or usage, to administer the estate, or, in that character, to aid any other person in so administering it, without judicial authorization." (Matter in brackets ours.)

The question also has been considered by the Supreme Court of New York and Ohio, and by writers on International Law.

In the recent case of *Re D'Adamo*, 212 N. Y., 214, the powers and duties of consuls were fully considered. There the question was whether the Italian Consul at New York or the public administrator of that State was entitled to administer the estate of an Italian subject dying at that place. The consul based his claims upon the provision of our Treaty with Argentine of 1853 (10 Stat. 1009), under the most-favored nation clause of our Treaty with Italy in 1878 (20 Stat., 732); and it will be observed that this is

the same Treaty which was before the Supreme Court of the United States in *Rocca vs. Thompson*, 223, U. S., 317.

So in this D'Adamo case, under a treaty much broader than our Treaty with China, the Court in denying to the consul any power of administration thereunder, said:

"This construction is confirmed when we consider that it harmonizes the function of consuls under the treaty with the function of consuls under established international practice. What that practice is has been stated in decisions and confirmed in declaratory statutes and regulations. The functions of consuls is to preserve derelict estates. When their countrymen die in foreign lands it is their duty to step in and guard the stranded property from waste. * * * The custody thus acquired is, however, provisional. It yields to the superior right of legally constituted representatives. If there are such representatives, a consul's function is limited to one of co-operation and intervention. If there are no such representatives it is his duty, so far as he is able, to administer the estate to the extent of gathering it in and transmitting it to the jurisdiction of the domicil. This much he should do, though the title of administrator be withheld from him. If the title were to be given him, its purpose presumably would be to authenticate his powers (rather) than to enlarge the occasion of their exercise.

The functions thus defined by usage have been confined by statutes and regulations declaratory of the existing practice. By Section 1709 of the United States Revised Statutes * * * it is provided," etc.

After setting out the provisions of Section 1709, Revised Statutes, the Court quoted from the Consular Regulations of 1896 (Sec. 409) as follows:

"A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen de-

ceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them, to be disposed of pursuant to the law of the decedent's estate. 7 Ops. Atty. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

And later in the opinion, in reply to the insistent attempt to assert a right in a Consul General, under the broad language and apparent power of the Argentine Treaty, to administer and distribute decedent's estate, the Court made this pertinent observation:

"We hold it to be incredible that there has been attached to the consular office a right that exceeds so greatly the occasion and the needs of the consular function. Before adopting a construction that will bring these consequences to pass, we have a right to expect a far plainer manifestation of the will of the national government than any that has been afforded by the language now before us."

Even more recently the Supreme Court of Ohio (Pagano vs. Cerri, 93 Ohio St., 345), when considering and rejecting the right of an Italian Consul to administer, settle and distribute the property of a deceased countryman, said:

"Now this is mere custodianship—preservation only—not administration. It cannot approach in importance to the matter of administration, settlement and distribution. It is temporary in its nature; implies the exercise of dominion only for the purpose of safe keeping."

To the same effect, see 9 R. C. L. on Diplomatic and Consular Officers, pages 158, 159; Moore's Dig. Int. Law Vol. 5, page 123.

Moreover, the powers of a Consul over the estate of a countryman dying within his consular district do not extend to probate and administration even when the decedent leaves a Will or has a personal representative. His powers in such case are carefully defined by the fifth paragraph of Section 1709 Revised Statutes and by Section 1711 Revised Statutes. The language of 1711 is in part as follows:

"When any such citizen so dying appoints by any lawful testamentary disposition, any other person than such officer (consul) to take charge of and manage said property, it shall be the duty of the officer (consul), whenever required by the person so appointed, to give his official aid in whatever way may be necessary to facilitate the proceedings of such person in the lawful execution of his trust."

In said fifth paragraph of Section 1709 R. S. the provision is that "if at any time before such transmission (to the Treasury of U. S.) the legal representative of the deceased shall appear and demand his effects in their hands they (consuls) shall deliver them up," etc. In commenting upon this provision the Supreme Court of the United States in *Rocca vs. Thompson*, 223 U. S., 317, 327, said:

"Section 1709 R. S. * * *, while it recognizes the right of consuls and vice-consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulate leaving there no legal representative, partner in trade, or trustee, to inventory the same, and to collect the debts, provides in the fifth paragraph of the section that if, at any time before the transmission to the United States Treasury of the balance of the estate, the legal repre-

sentative shall appear and demand the effects in the hands of the consul, they shall be delivered up," etc.

The Supreme Court thus having construed the statute and carefully distinguished between the case of an American dying in a foreign country and leaving "*there*" no legal representative (whose powers would be merely to "inventory" the estate, "collect the debts," and transmit the balance "to the United States Treasury") and a case where a legal representative should "*appear*" (obviously from without that foreign country and necessarily from that state of the United States wherein decedent had been domiciled and where such representative had been appointed), it follows that the Courts of decedent's domicil in the United States alone have power to appoint the "legal representative" mentioned in Section 1709 R. S.

Then, too, the Consular Regulations clearly recognize this, for they

"tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law or usage, to administer the estate, or, in that character, to aid any other person in so administering it, *without judicial authorization.*" (Italics ours.)

Rocca vs. Thompson, 223 U. S., 317, 329.

It thus is clear that Congress, by specific and comprehensive legislation, has carefully provided for the estates of Americans dying abroad and has defined and limited the power and duty of consuls with respect thereto. Such power has been restricted to "conservation," and the exercise of any power of administration or distribution prohibited. (Rocca vs. Thompson, *supra*.)

Thus prohibited, defendant's illegal administration and

distribution of decedent Cunningham's estate, again breached the bond in suit.

Next, we find that although the statutes of the United States prohibit the exercise of probate powers by the consular court at Shanghai, China, defendant sees to create three exceptions to this statutory prohibition, namely those made by *treaty, local law or usage*. His contention is based upon the declaration in Sec. 409 of the Consular Regulations of 1896 that a consul has no probate power "apart from the provisions of treaty, local law, or usage." Putting aside, for the moment, the well grounded legal principle that no such regulation may avoid an express statutory prohibition, and assuming the validity or legal existence of the three enumerated exceptions, let us apply them, in the above order, to the case at bar.

(b) *Treaty.* In our treaty with China in force at the time of the death of Henry H. Cunningham at Shanghai (Article 25, Treaty of 1844, Rec. 5) it is provided that:

"All questions in regard to rights, whether of property or person, arising between *citizens of the United States in China*, shall be subject to the jurisdiction and regulated by the authorities of their own government; and all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.
(Italics ours.)

That this treaty conferred no power on defendant to administer and distribute estates at Shanghai cannot be seriously denied, especially in view of the decision of the Supreme Court of the United States in *Roecea vs. Thompson, supra*, where the court not only failed to find any such power in much broader treaty provisions, but as well de-

nied the authority of our Federal Government to grant probate power to consuls.

The following language there used is most pertinent here. Said the Court:

"It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, *it would have been very easy to have declared that purpose in unmistakable terms.*" (Italics ours.)

Rocca vs. Thompson, 223 U. S., 316, 332.

(c) *Local Law.* Obviously there can be no Chinese law as "local law" in this connection, since the very object of the above treaty was to provide by extraterritoriality against the interference by any such Pagan laws with the rights of American citizens. Defendant, however, seeks to create a "local law" as to estates of Americans dying at Shanghai out of Section 4086 R. S. U. S.; his contention being that the section extended to China the provisions of the common law, which in turn embraced the power to administer estates.

Sections 4086 R. S. U. S. is a part of Chapter 47, consisting of Sections 4062 to 4130, inclusive, and entitled "Foreign Relations." A glance at this chapter reveals that it has nothing whatever to do with the estates of Americans dying abroad, but relates exclusively to criminal matters and disputes between or involving Americans. Section 4086, together with the three preceding and five succeeding sections, is in the nature of a saving or blanket provision manifestly inserted to cover exigencies possibly overlooked

by Congress and as to which no special or express provision had been made. The object of these sections is expressly declared by Section 4083 to be "*to carry into effect the provisions of the treaties* of the United States with China" and other countries. (Italics ours.) When Congress in 1860 passed this Section 4086 there already were in existence the provisions of Sections 1709, 1710, and 1711 R. S. U. S., which, dating back to 1792 (April 14, 1792, c. 24, s. 2, p. 255), specifically and by express language apply to and regulate the powers and duties of consuls as to the estates of Americans dying abroad. To say that Congress first enacted these special and comprehensive statutory provisions, carefully covering this subject of estates and thus defining and limiting the powers and duties of consuls in relation thereto, and then, long afterwards, by a blanket section inserted in a chapter having nothing to do with the estates of deceased Americans, and without appropriate language expressive of any desire for change, sought to modify or enlarge those existing powers and duties, is as unwarranted a claim as can be advanced, for such a contention violates every known rule of construction.

Moreover, as already pointed out, our Treaty with China conferred no probate powers, and, as the object of Section 4086 was to "carry into effect the provisions of the treaties of the United States with China" (and other countries), even the strained-for effect asked by defendant could not give him any of the power he sought to usurp to himself in this case.

It results that defendant's attempt to create a "local law" for China (a Pagan country), out of the provisions of Sec. 4086 R. S. U. S., must fail, even though defendant should successfully establish that the provisions of "local law" may sometimes form an exception to the bar of the statute

against the exercise of probate powers by a consul, under Consular Regulation 409.

(d) *Usage.* By his demurrer, as already pointed out, defendant has admitted that plaintiff's reference to the authenticated list (R., 5) of "Estates of citizens of the United States who died in Shanghai consular district of China, sent by the United States Consul General at Shanghai, China, received in the office of the Auditor for the State and other Departments," etc., is "exact" and "complete" from 1876 to 1906, as alleged by plaintiff, and shows the "usage" to have been for consuls at Shanghai to transmit said estates to Washington. Not having sought to attack this list and averment of fact, but admitting its complete correctness, anything to the contrary should not be considered by this Court.

Notwithstanding this admission as to "usage," however, defendant insists that Section 416 of the Consular Regulations of 1896 gave him the right to administer estates. He contends that this section and not Section 409 of said Regulations applies to China, Siam, and other Pagan countries. Assuming, again, that a consul might have probate power under "treaty, local law, or usage" (by virtue of provisions of the Consular Regulations making those three exceptions to the statutory denial of such power), it is apparent that, as a Consular Regulation could not be classified as a "treaty" or "local law" in the sense of the statute, or in any other sense, such Regulation could have force and effect, if any, only as a "usage." Obviously a Consular Regulation could in no event run counter to a statute, so that, even if the Regulation here relied upon by defendant had established a "usage," it must have done so *prior to the enactment of Sections 1709, 1710, and 1711, R. S. U. S. (italics ours)* the general provisions of which sections date back to 1792; else we should have the anomalous situa-

tion wherein, after a positive statutory provision, a usage or custom might grow up (or be designedly fostered) which finally might destroy that very statute. In other words, the strange spectacle would be presented of a statute itself countenancing the very instrument—viz: usage or custom—whereby its own destruction might be effected. That no such purpose is to be imputed to the framers of the Consular Regulations of 1896 is evidenced by the fact that the language is not that a consul later "may acquire" probate power, but that at that time it was declaratory of the fact that he "*has*" no such power "apart from" treaty, local law, or usage. (Italics ours.) Even supposing for the sake of argument that a consul might acquire probate power by treaty (though, as already indicated, the Supreme Court has said to the contrary in *Rocca vs. Thompson*, *O'Callaghan vs. O'Brien* and *Garzot vs. Rios De Rubio*, *supra*), here, where there is the statute prescribing, defining and limiting the defendant's consular powers and duties (Sections 1709, 1710 and 1711, R. S. U. S., 1792) as likewise those of his predecessors in office, certain it is there could be no after acquired "usage" in this connection, especially when it is remembered that "no custom will be permitted to override a positive and salutary rule of public policy" (*Bradley vs. Davidson*, 47 App. D. C., 266, 282), much less abrogate and destroy the very statute designed to guard against so doing.

But said Consular Regulation 416 does not even attempt to confer probate jurisdiction on consuls. What it does say is that "in China" * * * and other "non-Christian countries the property of decedents, both real and personal, is administered under the probate jurisdiction of the consular courts in those countries, *without interference in any respect by the local governments.*" (Italics ours.) It is manifest that the object of this regulation was to bring to the notice of consuls the fact that in China and other Pagan countries

extraterritoriality had been granted Americans by Treaty, and, therefore, in those countries, there could be no such "local law" as mentioned in Consular Regulation 409, a point already made under our sub-head (b). In Section 1709 R. S. U. S., the "duties imposed (on consuls) are where 'the laws of the country permit.'" *Rocca vs. Thompson*, 223 U. S., 317. So, by way of advising consuls that in China and other non-Christian countries, the laws did "permit" them to perform their duties without interference from local authorities, Regulation 416, calling attention to such permission was promulgated. The ill advised use therin of the words "is administered under the probate jurisdiction of the consular court," however, would in themselves indicate that broad powers of probate and administration were granted to such consuls (although consular Regulation 409 is exactly contrary, and as we have already seen, such powers could not be granted and never were intended to be so conveyed) were it not for the restraining and limiting restriction of the statutes, construed as they have been from time to time by the courts, showing that the use of the words in question was in the special, narrow and restricted sense of either collecting, conserving and transmitting estates to the United States for distribution, or in aiding in China any representative of that estate who already had received "judicial authorization" from the State of his domicile. Thus in *Rocca vs. Thompson*, *supra*, the Court referred to "early instructions of Secretaries of State emphasizing the right and duty of consuls to administer," but added. "But these instructions must be read in the light of the statutes of the United States, Section 1709," etc., and later spoke of the consul's duty as "to the *conservation* of the property of deceased countrymen." (Italics ours.) And in *Re D'Adamo*, 212 N. Y., 214, the Court spoke of the consul's duty to "administer" such estate "to

the extent of gathering it in and transmitting it to the jurisdiction of the domicil. This much he should do, though the title of administrator be withheld from him. If *the title were to be given him, its purpose presumably would be to authenticate his powers than to enlarge the occasion of their exercise.*" (Italics ours.) After saying that "the functions thus *defined by usage*" had been "confirmed" by Section 1709 R. S. U. S., and the Consular Regulations of 1896, the opinion continued: "We hold it to be incredible that there has been attached to the consular office a right (of probate) that exceeds so greatly the occasion and the needs of the consular function," and that before adopting such a construction they would "have a right to expect a far plainer manifestation of the will of the National Government." (Italics ours.) So, too, in *Pagano vs. Cerri*, 93 Ohio St., 345, the Court characterized a consul's power over the property of a deceased countryman as that of "mere custodianship.—preservation only,—not administration. It cannot approach in importance to the matter of administration, settlement and distribution. It is temporary in its nature; implies the exercise of dominion only for the purpose of safe keeping." (Italics ours.)

Moreover, the Consuls General of the United States have themselves recognized their lack of Probate power, and that it has been their custom and usage to transmit to the Treasury Department the property and effects of Americans dying abroad, and that this same practice has likewise been accepted by the State Department, is clearly evidenced by the Act of March 3, 1911 (36 Stat. 1083, Ch. 223), amending said Section 1709, R. S., as follows:

"Sixth. The Auditor for the State and other Departments shall act as conservator of such part of these estates as may be received at the Treasury, and for their protection the Secretary of the Treasury may

order such effects to be sold as may consist of jewelry or other articles which have heretofore or may hereafter be received at the Treasury, and pay the expenses of such sale out of the proceeds, provided application for these effects shall not have been made by the legal claimant within two years after their receipt. The Auditor is authorized to endorse all bills of exchange, promissory notes, and other evidences of indebtedness due to these estates, and to take such steps as may be necessary for their collection. The proceeds, together with such other moneys as may be collected by him, shall be deposited into the Treasury in trust for the legal claimant, and be reported to the Secretary of State."

The defendant Rodgers, therefore, possessed no power or authority to administer upon the estate of decedent Cunningham, either under statute, treaty, local law or usage, and as the demurrer establishes the fact that he admitted the alleged Will to probate and attempted to administer upon said estate by actually distributing its assets, it necessarily follows that the defendant breached the bond in suit.

Even assuming that defendant possessed probate power, there being no "lawful testamentary disposition" upon which to administer, defendant's attempted administration was unlawful and breached his bond.

It already has been seen that the power enjoyed by defendant over the estates of deceased countrymen did not amount to or embrace that of probate and administration. In exercising such power as he actually enjoyed, whatever its extent, the statute (Sec. 1711 R. S. U. S.) required the defendant, in case decedent died testate, to proceed only under a "lawful testamentary disposition," and thus he pretended to proceed in the case at bar. But the decedent Cunningham died intestate, because he was domiciled in the State of Maine and his alleged Will lacked the three witnesses required by the laws of that State, so that there was

no "lawful testamentary disposition" under which defendant could proceed. The defendant's action therefore was unlawful and breached the bond in suit, even though it be assumed that he possessed probate power.

In demonstrating that decedent Cunningham died intestate or left no "lawful testamentary disposition," it becomes necessary to consider whether he was domiciled in the State of Maine or in China, since his alleged Will had only two witnesses, instead of the three required by the laws of Maine. That plaintiff is entitled to have this question of domicile re-opened and finally determined in this proceeding may not be doubted, for in *Tilt vs. Kelsey*, 207 U. S., 43, 51, 53, in commenting upon an adjudication of domicil by another court, the Supreme Court said:

"Upon principle and authority, that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicile, nor even evidence of it in a collateral proceeding. * * * On the contrary, it is open to the courts of any State, in the trial of a collateral issue, to determine, upon the evidence produced, the true domicile of the deceased." (Italics ours.)

See also *Baker vs. Baker*, Eccles & Co., 242 U. S., 394, 403, 404.

Magruder vs. Drury, 37 App. D. C., 519, 540.

In his brief, filed in the Court of Appeals of the District of Columbia when this case was pending in that Court, appellee said:

"Appellee's demurrer must, therefore, admit decedent's domicil at time of his death in 1905 as Belfast, in the County of Waldo, Maine, although at the time sojourning and commorant in Shanghai, China * * * (p. 11).

The demurrer admits that the domicil of the decedent was at Belfast, Maine (p. 49).

But even if defendant in error had not thus admitted that decedent Cunningham was domiciled in the State of Maine, this Court must have so found "upon the evidence produced" as in *Tilt vs. Kelsey, supra*. The demurrer admits, among other things, that decedent "*always claimed and referred to*" Belfast, Waldo County, Maine, "*as his home and always evidenced an intention of there returning*," that is, to the domicil of origin (R., 26); that in said paper writing he declared that he was "*of Belfast, Maine, U. S. A.*" (R., 7); that said Dunning's Petition for Probate and the pretended Letters Testamentary issued thereon referred to decedent as "*a citizen of the United States*" (R., 12); and plaintiff's declaration avers that decedent's "*legal domicile*" was in the State of Maine at his death (R., 7). (All italics ours.) With this in mind, let us examine the case of *Ennis vs. Smith*, 14 How. (U. S.) 400, 423 (14 L. E. 472, 482, 482). There the issue involved the domicile of the Polish patriot Kosciusko, and so great was the weight given by the court to the declarations of the decedent, a Pole by birth, and sojourning in Switzerland at the time of his death, that France was his home, and such was the force accorded plaintiff's averments as to domicile, that the court did not hesitate to find an acquired domicile in France. This case was finally determined by the Supreme Court of the United States on appeal from the General Term of the Supreme Court of the District of Columbia, and the well reasoned opinion is as controlling in its logic as it is by way of precedent. The questions arose over the liability of certain sureties on administrators' bonds given in the Kosciusko estate, and one of the principal questions was as to Kosciusko's domicile, because, as the Court said (p. 425):

"For several hundred years upon the continent, and in England, from reported cases, for a hundred years,

the rule has been, that personal property, in cases of intestacy, is to be distributed by the law of the domicil of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord Thurlow speaks of it as such in the House of Lords, in the case of Bruce vs. Bruce. Erskine in his Institutes of the Law of Scotland, B. 3, tit. 9 sec. 4, 644, says, this rule is founded on the laws of nations. He says, 'When a Scotsman dies abroad *sine animo remanendi*, the legal succession of his movable estate in Scotland must descend to his next of kin according to the law of Scotland; and where a foreigner dies in this country *sine animo remanendi*, the movables which he brought with him hither ought to be regulated, not by the law of the country in which they locally were, but that of the proprietors patrio, or domicil whence he came, and whither he intends again to return. This rule is founded in the law of nations, and the reason of it is the same in both cases, that since all succession *ab intestatio* is grounded upon the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession, as the person whom it presumes to be most favored by the deceased."

It is to be noted that in the case at bar plaintiff does not ask this court to go as far as did the Supreme Court of the United States in this Ennis-Smith case for here the declarations of decedent Cunningham and the averments of the plaintiff are to the effect that the decedent still clung to his domicil of origin, Maine, and that at some time in the future he intended to return to his birthplace; not that he sought to claim or acquire a domicil of choice in a foreign land, as it was necessary for the Court to find in the Ennis-Smith case. Again, in the case at bar, plaintiff has the additional aid of the legal presumption favoring a domicil of origin, as "one will more readily be presumed to in-

tend returning to his earliest home than to a place of temporary abode." Ennis vs. Smith, *supra*.

In this same Ennis-Smith case, the Supreme Court, in commenting upon decedent's declarations and plaintiff's averments as to domicil (p. 423) said:

"They (declarations of decedents) have been received in the courts of France, in the courts of England, and in the courts of this country. * * *

*It places upon the defendants the burden of proving the intention, the complainants having shown, and the defendants having admitted, that he had *prima facie* a domicil in France. They have not done so. There is nothing in the record disproving the averments of his domicil in France, and we must, from his own declarations and other proofs in the record, receive it as a fact that he was domiciled there at the time of his death.*" (Italics ours.)

No argument is deemed necessary to demonstrate that the above language of the Supreme Court applies squarely to the admitted facts of this case and fixes decedent Cunningham's domicil in Maine. From this it follows that the said paper writing was void and of no force and effect, and being void, the said decedent Cunningham died intestate.

It may be remarked in passing, however, that had the fact of domicil not been as clear as just demonstrated, decedent Cunningham could in no event have acquired a domicil in Shanghai, even had he so intended or attempted, for having already seen that our treaty with China provided for extraterritoriality for Americans in that non-Christian and Pagan country, as a protection against barbarous and cruel punishments and customs naturally offensive to our ideas of humanity and right doing, we find Professor Moore saying in his Dig. of Int. Law, Vol. 3, page 815:

"Citizens of the United States residing in countries where they enjoy extraterritoriality, thus *living more or less under the protection of their own government and being answerable to its laws*, 'are generally held to retain their American domicil.' Mr. Rives, Asst. Sec. of State, to Mr. Sewall, Cons. General at Apia, March 6, 1888, S. Ex. Doc. 31, 50 Cong., 2 Sess. 34." (Italics ours.)

See also the celebrated and leading case upon this subject of *Re Tootal's Trust*, 1863, Law Rep. 23, Ch. D., p. 525, which clearly points out the impossibility of a citizen of a Christian nation acquiring a Pagan domicil,—and this despite the fact that in that case the decedent went to Shanghai, remained there, and there intended to spend the rest of his life.

But, assuming that decedent Cunningham could have acquired a domicil at Shanghai in *any* sense of that word, it could have been nothing more than a "commercial domicil" for trading purposes. This was pointed out by Kent (1 Kent's Comm., 80), who says:

"In Asia and Africa an immiscible character is kept up, and Europeans, trading under the protection of a factory, take their national character from the establishment under which they live and trade. *This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there, as in Europe, and the western part of the world, into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character, under the general sovereignty of the country.* (Italics ours.)

Again, assuming that defendant possessed probate power, there was no "judicial authorization" as required by statute, and defendant's unlawful distribution of said estate breached his bond.

Section 409 of the Consular Regulations of 1896 thus warn a Consul as to his duties:

"A Consular Officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, *without judicial authorization*. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of pursuant to the law of decedent's State, 7 Op. Att. Gen. 274." (Italics ours.)

In *Rocca vs. Thompson, supra*, this court said:

"The Consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law or usage, to administer the estate, or, in that character, to aid any other person in so administering it, *without judicial authorization*." (Italics ours.)

We already have seen that this "judicial authorization" to a consul could lawfully come only from some court of competent probate jurisdiction in the United States. In this case the demurrer admits that defendant recognized Dunning, the Executor named in decedent's alleged Will, and assisted Dunning in administering upon and distributing the estate, without the "judicial authorization" thus made a prerequisite to the valid exercise of his duties by a consul; in other words, that defendant attempted to give himself the required "judicial authorization." It results that

defendant breached the bond in suit by so doing, even if it be assumed that he possessed probate power.

The defendant possessed no judicial powers over estates.

Defendant Rodgers attempts to justify his acts in this connection by saying he was "acting judicially" and not as consul—a sort of dual personality, evidently deemed necessary to meet the exigencies of particular cases. His theory is that by acting as a judge, when exercising his powers and performing his duties in connection with the estates of deceased countrymen, he had greater powers than he would have had as a consul in performing the same acts, and that for his judicial acts he cannot be held liable. This very contention not only argues defendant's own appreciation of the fact that his consular powers gave him no such probate authority as he sought to exercise, but reveals his unfamiliarity with an important provision of the Revised Statutes of the United States, Section 4110, enacted in 1860, as follows:

"Sec. 4110. All such officers (consular officers and ministers) shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular officers, but as *judicial officers*, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers." (Italics ours.)

It thus appears that as early as 1860 Congress considered and sought to guard against just such a subterfuge as that to which the defendant has resorted in this case, by providing that he should be equally responsible for judicial as for his consular acts. In other words, Congress provided that the manner in which, or the title under which, a consul might perform his duties or exercise his powers, should not affect or enlarge those duties and powers, or result in immunity.

But even if Sec. 4110 R. S. U. S. had not been enacted, and defendant had been responsible only for those acts that he performed as consul,—in other words, assuming that he enjoyed immunity for what he did while “acting judicially”—he had no judicial power with respect to estates. In *Dianese vs. Hale*, 91 U. S. 13, 16, this court said, that

“for any judicial powers which may be vested in consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the State which the consuls represent.”

The provisions of our treaty with China, together with the Statutes of the United States defining the duties of consuls, already have been considered herein and the fact made clear, that no probate power has been conferred upon the consul or consular court at Shanghai, so that the following language of the Supreme Court in *Ross vs. McIntyre*, 140 U. S., 453, 480, when passing upon our very similar treaty with Japan shows that the defendant was not “acting judicially.”

“The Consular court is a court of limited jurisdiction. It is undoubtedly a court of that character, limited by the treaty and the statutes passed to carry it into effect, and its jurisdiction can not be extended beyond their legitimate meaning.” (Italics ours.)

And see 9 Op. Atty. Gen. 294.

It will be observed, therefore, that even if it be assumed that defendant could legally sit as a judicial officer when discharging his consular duty with respect to estates, he would be a judge of a court of “limited jurisdiction,” or only an inferior court, rather than a superior or higher court. So, defendant would be liable for such judicial acts at common law, as well as under Sec. 4110 R. S. U. S., for

"An officer, not a judge of a *higher* court, is * * * liable for every act in excess of jurisdiction. This is such a fundamental principle of the English law that there are few cases which directly discuss it. In the cases, which are legion applying the principle, the courts devote almost all their attention to answering the question, has there been an *excess* of jurisdiction, and, in case the answer is in the affirmative, they, as a matter of course and without argument, hold the officer acting in excess of his jurisdiction liable." (Italics ours.)

29 Cyc. 1441.

Tracy vs. Swartwout, 10 Peters (U. S.) 80.

Little vs. Barreme, 2 Cranch (U. S.) 170.

Kelly vs. Bemis, 4 Grey (Mass.) 83.

Valley vs. Tunnel Co. 178 Ill. A. 388.

In Tracy vs. Swartwout, *supra*, the Supreme Court said:

"It would be a most dangerous principle to establish, that the acts of a ministerial officer, *when done in good faith*, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." (Italics ours.)

Moreover, in any event, even

"a judge who, by virtue of his office, comes into possession of the estate of another and undertakes the administration and distribution thereof *is civilly liable* for any *erroneous or corrupt disbursements* therefrom." (Italics ours.)

23 Cyc. 571.

Disbrow vs. Mills, 62 N. Y. 604.

Wheeler vs. Barker, 51 Neb. 846.

State vs. Lazarus, 39 La. Ann. 142.

Brown vs. Rutledge, 92 S. E. (Ga.) 774.

It results that, whether defendant was "acting judicially" or as a consular officer in this case, he breached the bond in suit.

The United States Court for China.

In 1906, or the year following the acts herein complained of, Congress passed an Act "Creating a United States Court for China and prescribing the jurisdiction thereof" (34 Stat., 814). This Act provided that the court should sit at Shanghai, among other places in China, and should "have and exercise *supervisory control over the discharge by consuls and vice-consuls of the duties prescribed by the laws of the United States relating to the estates of decedents in China.*" (Italics ours.) The wisdom of Congress in so doing may not be doubted in the light of this record. It is most significant that, in enumerating such "duties" of consuls to be so supervised, this Act of 1906 is completely silent as to any probate power. Nor does any part of the Act allude to or attempt to confer such power. Such an attempt would have been vain, in any event, for "matters of pure probate * * * are not within the jurisdiction of courts of the United States" (O'Callaghan vs. O'Brien, 199 U. S. 89, 110), and there is no reason to suppose that Congress intended—or indeed had the power—to endow the United States Court for China "with an authority *not possessed by the Courts of the United States.*" Garzot vs. Rios De Rubio, 209 U. S. 283, 302. (Italics ours.)

Moreover, the "duties prescribed by the laws of the United States relating to the estates of decedents in China," as referred to in the creation of this United States Court for China in the year 1906, were those specifically covered by Sections 1709, 1710 and 1711, R. S. U. S., and Congress, in the light of the Statute, knew that no strict probate duties were allowed to Consuls, whether acting judicially or otherwise, and furthermore saw to it that *none such* were attempted to be granted even to the court especially designed

to give jurisdiction to all necessary matters in Shanghai pertaining to Americans.

Prior Litigation.

This is the *first* and *only* suit ever brought against defendant by plaintiff in error.

In 1906, however, Albert W. Cunningham, brother of plaintiff in error and of decedent, Henry W. Cunningham, brought an action as administrator of the estate of said decedent—under appointment by the probate court of Waldo County, Maine—against defendant in the United States Court for China (created about a year after said defendant's claimed wrongdoing—34 Stat. L., 815). There it was finally determined that the Maine administrator, as such, could not maintain an action in China, or outside the jurisdiction of the appointing court; and the case terminated without any decision on the merits.

During the pendency of that case decedent's two sisters attacked in Maine the appointment by the probate court there of the said Albert W. Cunningham as administrator. The sole question involved in this suit was as to the legality of the probate court's appointment of said administrator. Reaching the Supreme Court of Maine, it was there held (105 Me., 326) that decedent, being at the time of his death, domiciled in Shanghai, China, and not in Maine, the probate court of Maine had no jurisdiction to appoint any such administrator. Accordingly, said court reversed the decree of the probate court of Maine, under which said Letters of Administration had issued, thereby revoking those Letters and annulling any and all steps theretofore taken by said administrator.

This Maine case, Mather vs. Cunningham, 105 Maine,

326, is entitled to what weight in our consideration of the present case?

In the first place the facts as found by the Maine Court, and bottoming the opinion, are very different from the facts admitted by the demurrer in the present case. In at least two fundamental and pivotal points the cases are entirely dissimilar. In the present case—outside of the fact that this is a suit on the defendant's consular bond, while the Maine case was to contest the validity of the appointment of one of its own administrators—we find that the defendant himself admits (defendant's Brief, D. C. Court of Appeals, page 11) "decedent's domicil at the time of his death in 1905 was Belfast, in the County of Waldo, Maine"; whereas, the whole endeavor of the Maine case was its strained-after effect to find decedent's domicil in Shanghai, China.

Again at page five of defendant's Brief and quoting from the Maine case, defendant's counsel says:

"At the same time the Maine Court recognized the general practice and jurisdiction of the Consular Court, saying :

'In this connection it may be proper to add that the record shows that 108 estates, testate and intestate, have been administered through the consular court at Shanghai since 1865.' "

We are not concerned here with what the record might or might not have shown in the Maine case, or how many cases after 1905 were concluded in China by that little coterie intent only in adding to the luster or returns of their offices. We have our own record, and it shows as a fact admitted by the demurrer, that the practice and jurisdiction of the consular court in Shanghai from July 7, 1876, to July 3, 1906, was to send "the entries and accounts of the

estates of citizens of the United States who died in the Shanghai consular district of China" to the Treasury of the United States (R. 5), there to be holden as required by statute; and in the light of what was said to the point in the D'Adamo case (1914), 212 N. Y., 214: "It is not to be lightly presumed that the Government of the Nation departed from the precedents of a century and * * * overturned its settled practice," and by certain of our distinguished Secretaries of State, on other occasions, it would seem clear as to what was, indeed, the settled practice of such consular courts.

Moreover, this Maine case could have no binding force upon this court (Magruder vs. Drury, 37 App. D. C., 519; Baker vs. Baker, Eccles & Co., 242 U. S., 394; Tilt vs. Kelsey, 207 U. S., 43) and the above two essential differences between them render useless any further comparison.

There is, however, one other aspect of the case to which we would invite the court's attention in passing.

In commenting upon the Tootal's Trust case, 23 Ch. Div., 532, and the trend of "modern authority" as being in opposition thereto, the learned court refers to the opinion of Judge Wilfley of the United States Court for China and sitting there in 1907 *in re* probate of the Will of Young J. Allen, as at least a part of that "modern authority." The Maine Court quotes with approval from Judge Wilfley's opinion and apparently upholds his conclusion "that this court (the Court for China) in the administration of his estate (the Allen estate) will be guided by the law which Congress has extended to Americans in China, which is the common law."

But we already have seen (under "local law" *ante*) that Congress did not extend to China the provisions of any "common law" relating to the administration of estates, whether by Section 4086 R. S. U. S., or any other statute.

Assuming the contrary, however, what common law was so extended?

From the vicinity of what Pandora's box are we to search for this "common law"?

Is it Chinese "common law"—if there be any such—that is to wrest the bulwarked rights from one domiciled in his native state, which rights have been constitutionally reserved to him as a citizen of the United States?

Yet, extraterritoriality has been preserved to us by our treaty with China, has it not?

Then could it be possible that the very thing excluded under such treaty was meant to be included? That the treaty meant nothing?

Or, perhaps, after all, what was intended was that this "common law" should be found as a part of the common law of England, as adopted by us and merged into our American jurisprudence, because in another decision by the same learned Judge Wilfley (*Re Probate of the Will of John Pratt Roberts*, 2 Amer. Int. Law, 233), he says:

"We think there can be no question about the proposition that Congress meant to extend the law of the administration of estates to China under the term 'common law' as fully as it meant to extend the law to crimes, which must have been its first consideration in enacting the statutes for the purpose of carrying into force and effect the treaties of extraterritoriality with China."

But could the United States adopt much or little of the common law of England, save as it affected her own sovereignty? And, as we have already seen, in the administration of estates, each State is sovereign and not the United States, for there cannot be any Federal law of probate and administration (*Rocca vs. Thompson, supra*, and *Callaghan vs. O'Brien, supra*).

Then are we to liken the law "of the administration of estates" to that of "crimes"? The one constitutionally reserved to each of the states, sovereign each in its own right; the other to the sovereignty of the United States?

And it should not be forgotten in this connection that any examination of the so-called "modern authority" discloses, either that it is the result of the consolidated effort of those who have held sway in China since about 1905, or that the writers refer to the British Empire—an entity which holds its sovereignty over probate matters as over other things—not, as with us, where the sovereignty in this respect is held each by the several states.

And it has been urged by counsel for the defendant that because the Ross case (140 U. S., 453) decided that as to "crimes," and because the enforcement of the sovereign laws of the United States concerning them abroad ("where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and try an offender would, in a majority of cases, cause an abandonment of all prosecution") dispensed with the necessity for a jury; that, accordingly in "the administration of estates"—preserved to each domiciled citizen of a state as an inalienable right—a jury could likewise be dispensed with by the Federal Government in a matter which concerned not the sovereignty of the United States. How preposterous! Is it not one's fundamental right, when properly interested, to file a caveat to a Will? In the present case had not the plaintiff in error the indubitable legal right to contest by caveat the so-called Will of decedent Cunningham? Had he not his constitutional right, when so contesting, to his trial by a jury? Was he not deprived of this, his right, by defendant's hurried usurpation of a power

that never existed as to him? Can it be that in ninety-nine out of every one hundred cases, where the next of kin are residents in the United States, their rights are to be foreclosed upon by any such hurried movements as were practiced by the defendant in the present case, and without notice, without any opportunity to contest the validity of any attempted testamentary disposition, and without the right to a trial by jury, to have their valuable property rights divested and torn from them?

Then, if it was not the "common law" of England, the only other possible source from whence sovereign law could be applied, was from decedent's own state of Maine, which required three attesting witnesses and not two, to the validity of any Will.

It has before been urged by defendant's counsel that the consequences might be serious if the practice concerning the administration of decedents' estates, as established in China since about 1905, be corrected at the present time; but it would seem to be of far more serious import that the stability and sanctity of our law should be restored without further menace by the continuation of any such pernicious practice; and in conclusion we respectfully urge that this malignant growth be stopped while yet there be time, and the former practice—the real practice—with its safeguarding of our rights of property be preserved inviolate to the generations of Americans yet unborn—Yea; even as the Fathers ordained it from the very beginning!

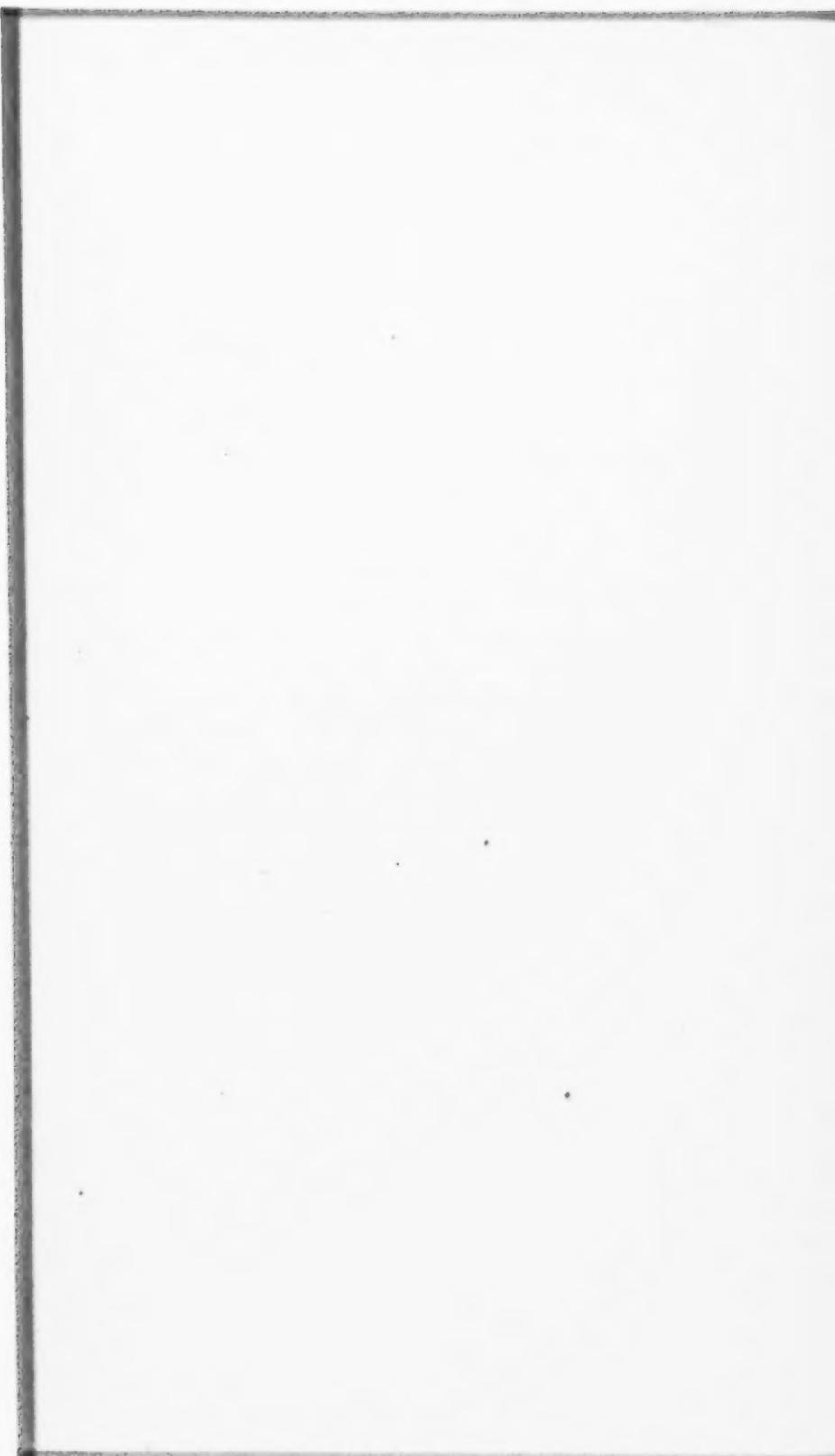
Accordingly, it is respectfully asked that the judgment of the Court of Appeals of the District of Columbia, sustaining defendant's demurrer and dismissing plaintiff in error's case, be reversed.

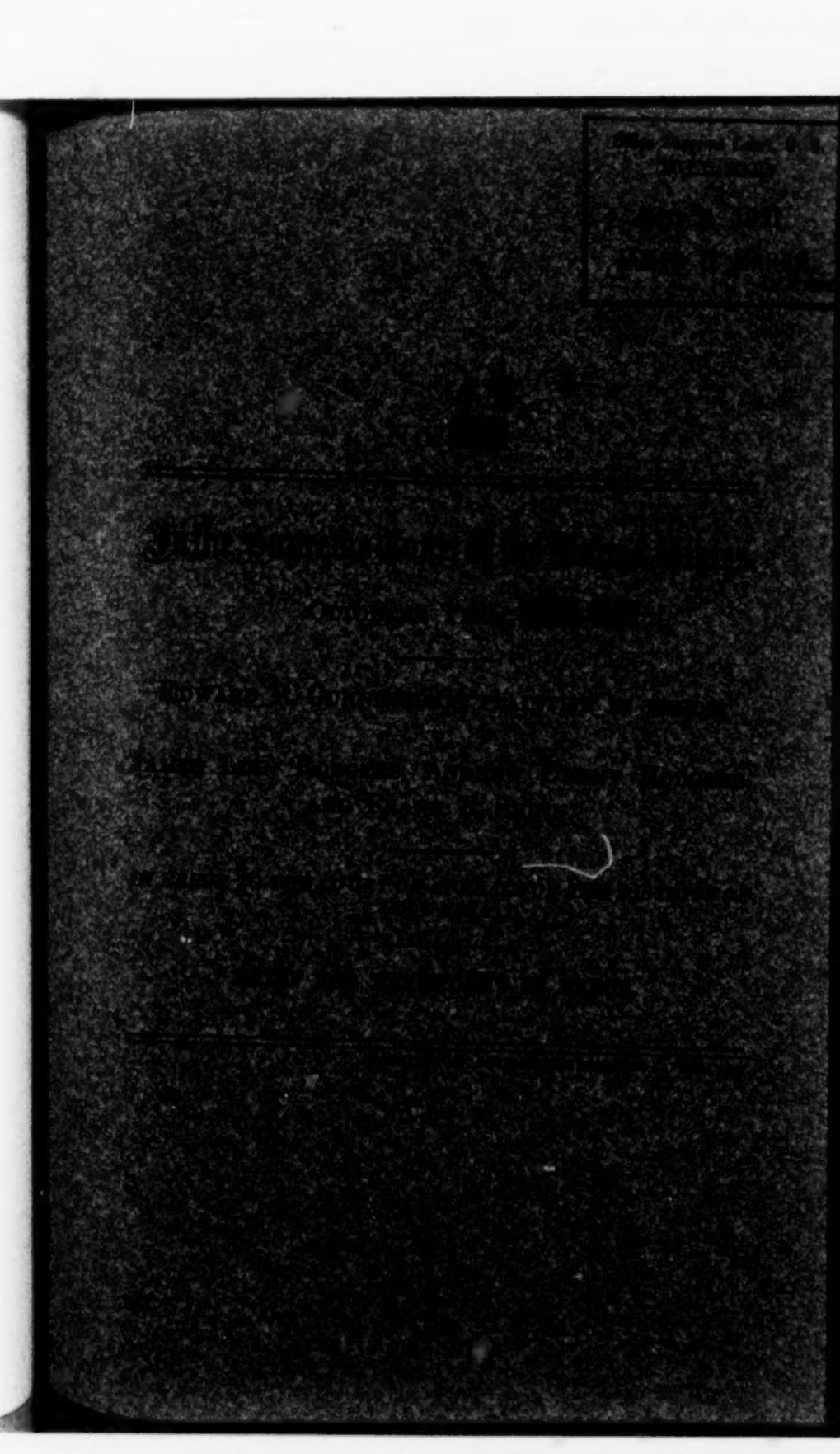
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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

EDWARD R. CUNNINGHAM, PLAINTIFF IN
error,
v.
JAMES LINN RODGERS, ANDREW DENNY
Rodgers, and Frank R. Shinn.

No. 321.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

This is a suit commenced in the Supreme Court of the District of Columbia to recover on the bond of defendant in error, James Linn Rodgers, as consul general at Shanghai, China. The theory of the suit is that it was the duty of Rodgers to take possession of the personal estate left by a citizen of the United States dying within his consulate and leaving no legal representative, partner in trade, or trustee appointed by him to take care of his effects, and, after paying debts contracted in China, to transmit the balance of the estate to the Treasury of the United States, to be held in trust for the legal claimant.

The allegation is that a brother of the plaintiff in error died in China leaving a considerable estate and

that defendant in error, instead of taking possession of the estate and transmitting it to the Treasury of the United States, assumed jurisdiction to probate an alleged will, issued letters testamentary, and permitted the estate to be administered and distributed according to the will. The plaintiff in error sued to recover what would have been his share of the estate if the deceased had been treated as dying intestate. It was also alleged that, under instructions from the defendant in error, the executor transferred, without consideration, certain real estate in China which belonged to the deceased. The defendants named were James Linn Rodgers, as principal, and two sureties on his bond. The sureties, however, were not served with process and only Rodgers was before the court.

RULINGS OF THE COURTS BELOW.

The Supreme Court of the District of Columbia sustained a demurrer and dismissed the suit. On appeal, the Court of Appeals of the District of Columbia affirmed the judgment upon the ground that, if the facts alleged constituted a right of action, it was a right of action in favor of the personal representative of the deceased and not one which could be asserted by his individual heirs at law.

FACTS ALLEGED.

Defendant in error was nominated for consul general of the United States at Shanghai, China, and his nomination was confirmed by the Senate. On March 27, 1905, he executed to the United States

a bond in the sum of \$8,000, as required by the statutes, conditioned as follows:

That the above-bounden James Linn Rodgers, appointed consul general of the United States at Shanghai, China, shall truly and faithfully discharge the duties of his said office according to law, and shall truly and faithfully account for, pay over, and deliver up all fees, moneys, goods, effects, books, records, papers, and other property which shall come into the hands of the said James Linn Rodgers, or into the hands of any other person, to his use as such consul general under any law now or hereafter enacted, or by virtue of his office, and that he shall truly and faithfully perform all other duties now or hereafter lawfully imposed upon him as such consul general. And these presents are subject to this other and further condition, that he, the said James Linn Rodgers, will not, while he holds the said office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as a clerk or other agent for any such person, to, from, or within the port, place, or limits of his consular district, directly or indirectly, either in his own name or in the name or through the agency of any other person; and, in case he, the said James Linn Rodgers, shall violate the provisions of this condition, that then the above-named obligors shall be liable to said obligees to a penalty for the breach of such condition in a sum equal to the amount of the annual compensation of said James Linn Rodgers, which is hereby stipulated, agreed upon, and

admitted by way of liquidated damages; but that this condition shall not impair or prevent the right of the United States to prosecute said James Linn Rodgers for the recovery of said penalty against him, the said James Linn Rodgers, individually, the same as if this bond had not been given; and if the said James Linn Rodgers shall conform to all the above conditions, then this obligation to be void; otherwise to remain in full force. (Rec., p. 35.)

On June 10, 1905, while defendant in error was acting as consul general, Henry H. Cunningham, a citizen of the United States whose legal domicile was in the State of Maine, but who was "sojourning and commorant in Shanghai, China," died leaving personal property of the value of about \$52,000, and leaving no heirs or next of kin, except two brothers and two sisters residing in the United States. The plaintiff in error was one of these brothers. After the death of Henry H. Cunningham there was presented to the consulate in Shanghai a will by which Cunningham made bequests to his Chinese mistress and to one E. H. Dunning, of Shanghai, and directed that, when his debts and funeral expenses and these bequests were paid, the remainder of his estate should go to his sister, Mrs. A. C. Mather, who resided in the State of Maine, or, in case of her death, that it be equally divided between her son and the daughter of one of his brothers, E. R. Cunningham, of Washington, D. C.

Proceedings were had before the defendant in error, holding the court of the American consulate

general, by which this will was admitted to probate and letters testamentary issued to E. H. Dunning, of Shanghai, who was named in the will as executor. The estate was administered and distributed according to the terms of the will, except, it is alleged, there was certain real estate which, under the direction of plaintiff in error, the executor transferred without consideration to one Mrs. Green.

GROUNDS UPON WHICH RELIEF IS SOUGHT.

The gravamen of the suit is that the defendant in error, as consul, had no probate jurisdiction and was without authority to admit the will to probate or to grant letters testamentary, and that the will was invalid because signed by only two witnesses, when the laws of Maine, of which State decedent was a citizen, required three witnesses, and that it was the duty of the defendant in error to take possession of the estate and, after payment of debts, to transmit the balance to the Treasury of the United States, to be held for those entitled. The claim is that plaintiff in error, as one of the next of kin, is entitled to recover, on account of this alleged neglect of duty, damages to the extent of his interest in the estate, assuming that the decedent died intestate.

STATUTES INVOLVED.

The provisions requiring consular officers to give bond are found in sections 1697, as amended by section 1 of the act of December 21, 1898 (30 Stat., c. 36, p. 770), and 1735 of the Revised Statutes.

Sections 1697 and 1735 were taken from the act of August 18, 1856 (11 Stat., c. 127, pp. 52, 56). Section 1697 provides that every consul and commercial agent shall give a bond—

conditioned for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person to his use as such consul general, consul, or commercial agent, under any law now or hereafter enacted; and for the true and faithful performance of all other duties now or hereafter lawfully imposed upon him as such consul general, consul, or commercial agent.

Section 1735 provides:

Whenever any consular officer willfully neglects or omits to perform seasonably any duty imposed upon him by law, or by any order or instruction made or given in pursuance of law, or is guilty of any wilful malfeasance or abuse of power, or of any corrupt conduct in his office, he shall be liable to all persons injured by any such neglect, or omission, malfeasance, abuse, or corrupt conduct, for all damages occasioned thereby; and for all such damages, he and his sureties upon his official bond shall be responsible thereon to the full amount of the penalty thereof, to be sued in the name of the United States for the use of the persons injured. Such suit, however, shall in no case prejudice, but shall

be held in entire subordination to the interests, claims, and demands of the United States, as against any officer, under such bond, for every willful act of malfeasance or corrupt conduct in his office.

The petition refers also to section 4110 of the Revised Statutes, enacted June 22, 1860 (12 Stat., c. 179, p. 76), which is as follows:

All such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular officers, but as judicial officers, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers.

This section, however, has no bearing on the questions now involved, as it is merely declaratory of the responsibility of consular officers.

As sections 1697 and 1735 of the Revised Statutes were enacted, they provided for a bond upon which any person injured by the neglect or malfeasance of the officer might recover damages, but the suit was required to be brought in the name of the United States for the use of the person injured. It was made clear, however, that the bond was primarily for the protection of the United States and could not be resorted to until all rights in favor of the United States were satisfied. This latter provision remains unchanged, but the right of the aggrieved person to sue in his own name was conferred by the act of

December 21, 1898, which amended section 1697 by adding the following:

In case of a breach of any such bond, any person thereby injured may institute, in his own name and for his sole use, a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form; but if such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, and the United States, shall in no case, be liable for the same. The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by a breach of the condition of the same until the whole penalty has been recovered; and the proceeding shall always be as directed in this section.

The result is that, subject to the right of the United States to have claims in its favor first satisfied out of the bond, any person aggrieved by the official misconduct of a consul may sue in his own name on the bond.

Whether the American consul at Shanghai had jurisdiction to admit a will to probate and issue letters testamentary must be determined by an examination of the treaties between this country and China and the acts of Congress conferring jurisdiction upon such officers.

Plaintiff in error relies upon sections 1709 and 1710 of the Revised Statutes and section 409 of the

Consular Regulations of 1896. Sections 1709 and 1710 are taken from the act of Congress enacted April 14, 1792 (1 Stat., c. 24, p. 255). Section 1709 enjoins these duties upon consuls and vice consuls, where the laws of the country permit:

First. To take possession of the personal estate, etc.

Second. To inventory the same, etc.

Third. To collect and pay debts to and from the "deceased in the country where he died."

Fourth. To sell the perishable part of the estate and such other part as may be necessary to pay debts and, at the expiration of one year, the residue of the estate.

Fifth. "To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant," unless the legal claimant shall appear and demand his effects in the hands of the consul.

Section 1710 of the Revised Statutes provides for publication of notice of death and also the giving of notice to the Secretary of State.

By section 1711 of the Revised Statutes, which was enacted on August 18, 1856 (11 Stat., c. 127, p. 63), an exception was made to the rule that it was the duty of a consul to take possession of the estate, settle the debts, and transmit the balance, as follows:

When any citizen of the United States, dying abroad, leaves, by any lawful testamentary disposition, special directions for the custody and management, by the consular officer of the port or place where he dies, of the personal property of which he dies possessed

in such country, such officer shall, so far as the laws of the country permit, strictly observe such directions. When any such citizen so dying, appoints, by any lawful testamentary disposition, any other person than such officer to take charge of and manage such property, it shall be the duty of the officer, whenever required by the person so appointed, to give his official aid in whatever way may be necessary to facilitate the proceedings of such person in the lawful execution of his trust, and, so far as the laws of the country permit, to protect the property of the deceased from any interference of the local authorities of the country where such citizen dies; and to this end it shall be the duty of such consular officer to place his official seal upon all of the personal property or effects of the deceased, and to break and remove such seal as may be required by such person, and not otherwise.

It will be seen that, as a result of these provisions, it became the duty of consular officers to take possession of personal estates unless the decedent, by lawful testamentary disposition, gave special directions for the custody and management of his property, and, in that event, merely to give such aid as should be necessary to carry out the instructions so given.

Section 409 of the Consular Regulations of 1896 merely put these general provisions of law into effect. **It** is as follows:

A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his

countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of pursuant to the law of the decedent's State. (7 Op. Atty. Gen., 274.) It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory.

It will be observed that this is a statement of the law applying to consular officers in general. It is expressly limited to a statement of the rights and powers of such consular officers "apart from the provisions of treaty, local law, or usage." In this case it is necessary to look to the treaties between this country and China and the statutes enacted pursuant to them to determine to what extent the rule above stated is modified in the case of consuls in China. That rule applies generally in Christian countries, where treaties have not provided for consular administration of estates and where all probate matters are left to the laws of the country in which the decedent dies. It has long been the custom of this country, however, to acquire by treaty very different rights in non-Christian countries. There have been two treaties with China on this subject—one in 1844 and the other in 1858. Article 25 of the treaty of 1844,

which was incorporated as article 27 of the treaty of 1858, is as follows:

All questions in regard to rights, whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction of and regulated by the authorities of their own Government. And all controversies occurring in China between citizens of the United States and the subjects of any other Government shall be regulated by the treaties existing between the United States and such Governments, respectively, without interference on the part of China.

After the treaty of 1858, the act of June 22, 1860 (12 Stat., c. 179, p. 72), with special reference to China and other non-Christian countries, conferred jurisdictions upon consuls in those countries which did not belong to consuls in Christian countries. The provisions of this act were carried into the Revised Statutes as sections 4083, 4084, 4085, and 4086. Section 4083 is as follows:

To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty.

Section 4084 confers jurisdiction in criminal cases. Section 4085 is as follows:

Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively.

Section 4086 is as follows:

Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity

and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

That the effect of these treaties and statutes was to establish in the non-Christian countries named a different rule from that which prevailed in Christian countries and to confer probate jurisdiction in the former has always been understood and acted on by the Executive Department of the Government. Thus, the Consular Regulations of 1896, which contained the general provisions above quoted, also, in Article XXX, under the Title "Judicial Powers in non-Christian Countries," by section 650, provide as follows:

Consular officers charged with the judicial functions referred to in this article will make a semiannual report to the Department of State in the case of each estate of deceased American citizens that has come within their probate jurisdiction. * * * These reports will embrace the amount of the decedent's estate, both personal and real; the names of the parties interested, so far as known; the name of the administrator or of the executor, if there be a will; the exact amount of money that has come to the hands of the court or to those of the administrator or executor; if

there has been any distribution of the estate, the amount of such distribution and to whom made; and the amount of all expenses and court or other fees received. They should also contain a clear statement of the judicial proceedings in each case, together with any information that will enable the department to reach an accurate understanding of its condition.

Even more specific is section 416 of the same regulations, as follows:

In China, Japan, Madagascar, Siam, Turkey, and other non-Christian countries the property of decedents, both personal and real, is administered under the probate jurisdiction of the consular courts in those countries, without interference in any respect by the local governments.

CONTENTIONS OF THE DEFENDANT IN ERROR.

The defendant in error contends that the judgment should be affirmed because—

- (1) If the facts alleged constitute a cause of action, the right to sue is in the personal representative of the decedent and not in his individual heirs or next of kin.
- (2) The defendant in error, as consul at Shanghai, China, had jurisdiction to admit the will to probate and issue letters testamentary.
- (3) The validity of the will is not controlled by the laws of Maine requiring three witnesses.
- (4) If the will was not a valid will, the most that can be said is that, in the exercise of judicial power, the defendant in error committed an error of judgment, for which he is not liable in damages.

BRIEF.**I.**

Plaintiff in error can not, in any event, as heir or next of kin, maintain this suit.

The Court of Appeals was clearly right in holding that, under the facts alleged, the right of action, if any, was in a personal representative of the decedent and not in an heir or next of kin. The claim is that defendant in error has made himself liable in damages because he failed and neglected to take possession of the personal estate and dispose of it in the manner directed by the act of Congress above referred to. If it be conceded, as it is not, that it was his duty to do this, and that he is liable on his bond for a failure to discharge that duty, the question is, who is the injured party who may sue? The plaintiff in error says that he is aggrieved because, as a result of defendant in error's neglect of duty, he has not received the portion of the estate which would have come to him if that duty had been performed. It must be remembered that, if the defendant in error had taken possession of the estate, he would not, in any event, have paid over any part of it to the plaintiff in error. If he had taken possession, it is expressly provided by section 5 of section 1709 of the Revised Statutes that, after paying debts, consuls shall transmit the balance to the Treasury of the United States—

except that if at any time before such transmission the legal representative of the de-

ceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings.

Moreover, by Section 1711 of the Revised Statutes, it is provided that consuls shall not take possession if the decedent makes a testamentary disposition giving other directions. Assuming, therefore, for the argument, that the will in this case was not a lawful testamentary disposition and adopting plaintiff in error's theory of a consul's duty, the defendant in error should have taken possession of the estate. Having done so, he could not lawfully surrender it to any one, except "the legal representative of the deceased." If no such representative appeared, he should have transmitted the estate to the Treasury of the United States, "to be holden in trust for the legal claimant." Thereafter, the consul would have been charged with no duty. The Treasury was not directed to distribute it among *the claimants*, but to hold it for *the legal claimant*. Evidently the intention was not to make of the Treasury an administrator for the purpose of distributing funds, but to require it to be merely the custodian of the estate until it could be paid to a *claimant* clothed with authority to distribute it as the law required. This, of course, could be only a duly appointed personal representative. And this is the construction which the Treasury Department has adopted and followed. (11 Comp. Dec., 713; 12, Id., 439.) If, therefore, the defendant had discharged the duty which it is claimed rested upon

him, the plaintiff in error could not, in his own name, have withdrawn a single dollar of the estate from the Treasury. His rights could only have been worked out through the appointment of an administrator, to whom would belong the duty of administering the fund and who would be liable to him for not properly distributing it. That plaintiff in error could not have received from the Treasury any part of this estate in his own name and right is conceded in his brief in this court. At page 12, after referring to the provision of the statute that the estate is to be held in trust for the "legal claimant," and the ruling of the Treasury Department above referred to, it is said: "Of course, such 'legal claimant' would be the personal representative of the decedent." If, therefore, there was no right to demand of the Treasury the payment of any money which the defendant in error might have transmitted to it, it would be an anomaly to say that the plaintiff in error can maintain a suit against the defendant in error for failing to transmit the money to the Treasury.

The entire contention of the plaintiff in error seems to be based upon an unwarranted construction of the amendment to section 1697, which authorizes a suit, in case of a breach of the bond, by any person thereby injured "in his own name and for his sole use." But it must be remembered that, until this amendment, the law expressly provided that all suits on bonds of this kind should be brought in the name of the United States for the use of the party aggrieved. The object of the amendment was to

change this rule so that the United States need not be made a formal party. It did not attempt to change the rule as to who should have the right to demand or receive the estate either from the consul or from the Treasury. It simply provided that whoever had this right could exercise it in his own name and without making the United States a formal party. As we have seen, only a legal representative had the right to demand possession of the estate from the consul, and only the legal claimant, conceded to be a personal representative, could demand it from the Treasury. The only effect, therefore, of the amendment was to provide that a personal representative who, by reason of a breach of the bond, was prevented from receiving what he was entitled to receive should have the right to sue in his own name as such personal representative and for his sole use as personal representative. The person aggrieved and the person who is the legal claimant is the personal representative. Whatever right exists is in him. That right, as against a consul who has failed to perform his duty, can no more be enforced at the suit of the next of kin than the right to collect a note due the decedent at the time of his death. What the plaintiff in error would be entitled to receive, if he was right as to the liability of the defendant in error, could not be ascertained or determined until a full settlement of the estate. It might be that the estate owed debts in this country in a sufficient amount to leave nothing for the next of kin. It might be that a proper settlement in the

case of some estates would involve taking into account advancements. It might be that plaintiff in error was indebted to the estate to an extent which would leave him nothing. Congress very wisely did not impose either upon its consuls or its Treasury the duty of making such settlements and determining such questions, but left them to be determined in the ordinary way by requiring that the estate be turned over to the personal representative for administration.

It would seem, therefore, certain, beyond all doubt, that the Court of Appeals was right in holding that, so far as the personal estate was concerned, the plaintiff in error could not maintain this suit in his own name. The holding as to the real estate is equally correct. It will be observed that the act limits the property which the consul is authorized to take possession of to the personal estate. He is charged with no duty with respect to the real estate unless it be in connection with his duties as a probate judge. It is believed that, universally, the transfer of real estate is a matter controlled by the laws of the country in which the property is located. It is not claimed that the defendant in error took possession of any real estate. The only claim is that he directed the executor to convey it. The real estate, of course, remains as it was when the decedent died. If the plaintiff in error has any interest in it, manifestly that interest must be asserted in the courts of the country in which it is located, or, at most, in the United States court for China, which was created by

the act of June 30, 1906 (34 Stat., c. 3934, p. 814), after the death of the decedent in this case. At any rate, the theory of this case is that the defendant in error neglected to take possession of property which it was his duty to take charge of. There is no possible construction of the law which required him to take possession of real estate, and he can not be held liable on his bond for not doing so. The ground upon which the Court of Appeals based its action is therefore conclusive of the case.

II.

Whether the defendant in error had jurisdiction to formally admit the will to probate or not, no one was damaged unless it appears that the will was invalid.

The petition alleges that, after the death of decedent, there was produced what purported to be his will executed in Shanghai, China, June 13, 1900 (Rec., pp. 7-8). This will is set out in full in the declaration. There is no allegation that it was not, in fact, executed by the decedent. The only objection urged against its validity is that it was witnessed by two persons instead of three. It appears that the provisions of this will were faithfully carried out. The gravamen of the suit is that plaintiff in error was damaged by the carrying out of the terms of the will, because he would otherwise have been entitled to a share of the estate as next of kin. It is not alleged that any court has ever decided that this was not a will. The contention merely is that the consular court was

without jurisdiction to admit it to probate, regardless of whether it was valid or invalid. Manifestly, the plaintiff in error was not damaged by the probate, even if done without jurisdiction, if the will was, in fact, valid and could have been properly probated in any court. Unless, therefore, it appears that the will was invalid, and hence not subject to probate anywhere, this action, even if brought by the proper party, would have no sound basis on which to rest.

III.

Under the laws of Maine, the will, if valid under the laws applicable to the place where executed, was valid even to pass property in Maine.

The claim that there should have been three witnesses is based on the requirements of the statute laws of Maine, upon the assumption that the domicile of the decedent was in Maine. But if this latter fact be conceded, and if it be conceded that this makes the law of Maine applicable, the will is still not rendered invalid. It has been expressly held by the Maine court that the requirement of three witnesses applies only to a will executed in that State, and that a will executed elsewhere is valid if executed in accordance with the laws of the place of execution. Thus, it was said in *Lyon v. Ogden*, 85 Me. 374, 378:

The question is whether real property situated in this State can be effectually disposed of by a will having but two subscribing witnesses. The answer depends upon where the will is made. If made in this State, it will not.

Our law requires at least three subscribing witnesses. But if made in another State or country, where but two subscribing witnesses are required, or, if first proved and allowed in another State or country according to the laws thereof, and then legally allowed and recorded in this State, as it may be, it will.

If, therefore, this will was executed according to the requirements of the law applicable to the making of a will by an American citizen in Shanghai, China, it is a valid will.

IV.

**An American citizen residing and owning property
in China acquires a domicile there and, in the matter
of testacy, is subject to the rules of law established
by treaties with China and statutes of the United
States.**

The petition alleges that the decedent, an American citizen, was, at the time of his death, "sojourning and commorant" in China. Commorant means dwelling or residing. All the estate involved consisted of property located in China, and it is not alleged that decedent owned any property anywhere else. He was, therefore, an American citizen residing in China. If he had been residing in any country in which, by treaty, the United States had acquired no right to make its laws applicable, the administration of his estate would, confessedly, have been subject to the laws of the country in which he resided, regardless of his citizenship. The cases cited in the brief of plaintiff in error merely establish that this is the rule applied in this country in the

case of citizens of other countries having no treaties with the United States covering the subject. In the case of China, as we have seen, however, there is a treaty which gives to American citizens there what is sometimes called extraterritoriality—that is, although actually residing in China, they are subject to the laws of their own country. Congress, as we have seen, has passed statutes conferring judicial powers upon the consuls of the United States for the purpose of making effective the terms of the treaty. The civil jurisdiction thus conferred, after enumerating specifically certain matters, includes "all other matters" between citizens of the United States. If the probate of a will of an American citizen is a civil matter between American citizens, the probate jurisdiction is clearly conferred. If, however, it be said that the administration of an estate located in China is a matter in which Chinese subjects as well as Americans may be interested, and not, therefore, within the terms of the treaty, the result would be that the making of such a will and its probate would be subject to Chinese and not to American law. This contention, however, would scarcely be made by any one. The administration of estates is clearly one of the chief objects in view in the making of the treaties, and it seems too clear for argument that the making of wills and the administration of estates by American citizens residing in China are governed by the laws which Congress has made applicable to them. That Congress may establish courts for the purpose of exercising such jurisdiction and prescribing the rules

of law which shall obtain in such courts is too well settled to admit of discussion. *In re Ross*, 140 U. S. 453. The question, then, is, What laws has Congress made applicable to civil matters in China?

V.

The validity of a will executed by an American citizen residing in China is determined by the rules of the common law and not by the statutes of any State.

It must be remembered that the United States in making treaties acts as one Government and one Nation. The rights acquired by American citizens under such treaties are their rights as citizens of the United States, and not of any particular State of the Union. Congress, therefore, in prescribing the rules of law which shall prevail in the consular courts, has not attempted to extend to the territory over which such courts have jurisdiction the laws of any particular State of the United States. On the contrary, as shown above, by section 4086 of the Revised Statutes, it was provided that "jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require." And, by the same section, it was further provided that "where such laws are not adapted to the object

or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries."

The suggestion that, because the courts of the United States held in the various States of the Union can not be clothed with probate jurisdiction, it follows that Congress is without power to confer probate jurisdiction anywhere is without sound foundation. It is true that, as between the United States and the various States, the latter have exclusive jurisdiction over the probate of wills and the administration of estates. But where the United States has exclusive jurisdiction, as in the District of Columbia and in the Territories, its courts have always, of course, had probate jurisdiction, which was conferred by Congress. A citizen of any State of the Union residing in China has, by treaty, and the statutes above quoted, had the laws of the United States or the common law, and not the laws of any particular State, extended to him and his affairs. Congress had not seen fit to enact any statute regulating the probate of wills or the administration of estates in China. Therefore, by the very terms of the act above quoted, there being no statute of the United States adapted to determining the validity of a will, that matter, it has been enacted, is to be determined by the rules of the common law. The validity of the will in this case can not, for this reason, be said to depend in the slightest degree upon the statute of the State of Maine.

VI.

The will in this case was valid under the rules of the common law and hence, if not properly probated, was subject to be probated in the court having jurisdiction. Hence, plaintiff in error can not predicate a claim for damages on the fact that its provisions were carried out.

It is not denied that, under the common law, two witnesses are sufficient for the proper execution of a will. The case then comes to this: The declaration alleges the existence of a will executed as required by the common law, which is applicable by act of Congress to American citizens residing in China. That will has been faithfully executed and the estate has been distributed as it directed. The only complaint is that the court which assumed to admit it to probate was without jurisdiction. If this should be conceded, it would follow that it appears, from the petition itself, a valid will is in existence and all that is necessary to make entirely legal everything that has been done is that it shall be probated in a court having jurisdiction. In other words, the plaintiff in error says: There is a valid will in this case but it has not yet been probated. With the admission, however, that the will can and ought to be probated, and that when this is done the plaintiff in error will be entitled to no part of the estate, he certainly is not entitled to recover damages on the theory that a judicial officer has mistakenly assumed jurisdiction to do what some other judge ought to have done. Particularly is this true when the very

statute upon which he relies—that is, the statute which, in certain cases, makes it the duty of a consul to take possession of the personal property of a decedent—makes it his duty, in the case of a lawful will, merely to aid the person designated by the will to carry out its provisions. The statute does not say a duly probated will. A very good reason for not doing so is that, if plaintiff in error's theory is correct, it would have been necessary in this case to send the will to Maine and have it probated there by witnesses residing in China before it could be determined whether the consul should take possession or aid the executor in taking possession. Certainly, there can be no doubt that, whether authorized to formally probate the will or not, it was committed to his judgment the question whether it was a lawful will. If, in his judgment, it was, then it was his duty to aid in its execution.

VII.

At the time of decedent's death the consular court in which the defendant in error presided had jurisdiction to probate the will and supervise the administration of the estate.

The broad language of the statute conferring jurisdiction in all civil matters has been quoted. The purpose clearly was to remove American citizens and their property in China from the operation of the Chinese laws. The statute has always been construed by the State Department as conferring probate jurisdiction, and, as shown above, that depart-

ment, in its instructions to consuls, has required reports to be made of the administration of all estates under their probate jurisdiction. The United States court for China, established by act of Congress some two years after the death of this decedent, was given the same jurisdiction that consuls had previously exercised, and the judges of that court have uniformly held that this includes probate jurisdiction. Of course, if the defendant in error had jurisdiction to probate the will, the plaintiff in error has no case.

VIII.

The contention that an American citizen residing in China can not acquire a domicile there, but that for the purpose of testacy or intestacy his domicile of origin remains his domicile is not sound.

The plaintiff in error's theory seems to be that in a case where, by treaty, the local laws do not apply, an American citizen, under no circumstances, acquires a domicile, but remains, in law, domiciled in the State in which he formerly resided. This question he attempted to make in the courts of the State of Maine, where he sought to be appointed administrator of the estate of the decedent. This was resisted, upon the ground that the decedent was, in fact, domiciled in China. It was found that the decedent had no property in Maine, had no relatives residing at the place of his origin, and had been, since 1869, residing in China without any present intention to return. Under the facts, if he had been residing in any country with which we had no such treaty as that with China,

his domicile would have been in that country. The Supreme Court of Maine, therefore, reversed the order appointing an administrator upon the ground that the courts of Maine had no jurisdiction. The opinion in that case is a most learned and exhaustive one, and demonstrates, beyond any doubt, that the administration of an estate of this kind in China is in no way governed by the laws of Maine. For a full discussion of that question we refer to the case of *Mather v. Cunningham*, 105 Me. 326. It may be said, however, that this question can not properly be raised by demurrer in this case for the reason that the petition alleges that the domicile of the decedent was in Maine. It is also alleged, however, that he was sojourning and commorant in China, and it appears that all of the estate involved was located in China. Domicile involves a mixed question of law and fact, and it can hardly be said that the bare allegation that his domicile was in Maine, followed by the allegation that he was sojourning and commorant or dwelling and residing in China, is sufficient to negative a domicile in China. It is thought, therefore, that the court can very properly hold, from the allegations of the petition itself, that, in law, this decedent was domiciled in China. Of course, if the allegation of domicile can be said to prevent the consideration of that question, it will still be open to the defendant in error to show the facts upon a proper pleading.

Attention may also be called to the fact that the plaintiff in error commenced a suit against the defendant in error in the United States court for

China and undertook to prosecute an appeal from the judgment of that court to the Ninth Judicial District, as provided by statute, but his appeal was dismissed because taken before a final judgment. *Cunningham v. Rodgers*, 171 Fed. 836.

IX.

A judicial officer is not liable in damages for the exercise of a mere excess of jurisdiction or error in judgment.

In this case, defendant in error acted as a judicial officer. He acted in pursuance to instructions promulgated for his guidance by the State Department, which are entitled to the highest respect in construing the statutes and treaties. *Dainese v. Hale*, 91 U. S. 13, 20. If he committed any error, it was in exceeding his jurisdiction. It does not seem to us that even this error existed, but, if so, it was a mere error of judgment and there is nothing in the petition which challenges his good faith. For such an error a judicial officer is not liable in damages. *Randall v. Brigham*, 7 Wall. 523, 530, 536; *Bradley v. Fisher*, 13 Wall., 335, 351-352.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment of the Court of Appeals of the District of Columbia and it should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

APRIL, 1921.



Counsel for Parties.

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CUNNINGHAM *v.* RODGERS ET AL.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 42. Argued October 17, 18, 1921.—Decided January 3, 1922.

1. An action against a consul-general, upon his official bond, (Rev. Stats., § 1697, as amended,) for damage caused by his failure to perform his official duties touching the personal property of a decedent, can not be maintained by one who is not the personal representative but merely a possible owner of a share of the decedent's estate. P. 468.
2. A declaration alleging that an American citizen, dying in China, left valuable real estate, standing in his name in the land records of the United States Consulate at Shanghai, and that the consul-general there, despite his duty to conserve the decedent's estate, caused one to whom he had illegally granted alleged letters testamentary, to convey it to a third party without consideration, although the deceased had not devised it, and that such assumption of jurisdiction on the part of the said consul-general, though illegal and void, had the effect of dissipating a valuable part of the estate to the consequent loss of the decedent's brother, the plaintiff,—states no cause of action against the consul-general on his official bond. P. 468.

50 App. D. C. 51; 267 Fed. 609, affirmed.

ERROR to a judgment of the court below affirming a judgment of the Supreme Court of the District of Columbia sustaining a demurrer to the declaration in an action for debt and dismissing the action.

Mr. Clinton Robb and *Mr. George F. Curtis*, with whom *Mr. Leonard J. Mather* was on the brief, for plaintiff in error.

Mr. William C. Herron, with whom *Mr. Solicitor General Frierson* was on the brief, for defendants in error.

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Opinion of the Court.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Section 1697, Revised Statutes, as amended by Act of December 21, 1898, c. 36, 30 Stat. 770, requires every Consul-General before receiving his commission to execute a bond conditioned for the true and faithful performance of duties lawfully imposed upon him as such officer. It is copied in the margin.¹

Purporting to proceed under this section plaintiff in error brought an action in the Supreme Court, District of Columbia, against James Linn Rodgers, once Consul-

¹ "Sec. 1697. Every consul-general, consul, and commercial agent, before he receives his commission, or enters upon the duties of his office, shall give a bond to the United States, with such sureties, who shall be permanent residents of the United States, as the Secretary of State shall approve, in a penal sum not less than one thousand dollars, and in no case less than the annual compensation allowed to such officer, and not more than ten thousand dollars, and in such form as the President shall prescribe, conditioned for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person, to his use as such consul-general, consul, or commercial agent under any law, now or hereafter enacted, or by virtue of his office; and for the true and faithful performance of all other duties, now or hereafter lawfully imposed upon him as such consul-general, consul, or commercial agent. The bond herein mentioned shall be deposited with the Secretary of the Treasury. In case of a breach of any such bond, any person thereby injured may institute, in his own name and for his sole use, a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form; but if such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, and the United States shall, in no case, be liable for the same. The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by a breach of the condition of the same until the whole penalty has been recovered; and the proceeding shall always be as directed in this section."

Opinion of the Court.

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General at Shanghai, China, and the sureties upon his official bond. Process was served upon him but the sureties were not summoned and did not appear. The declaration alleges execution of the bond, its breach by Rodgers' failure to discharge his official duties concerning property left by plaintiff's brother who died in China June 10, 1905, and asks a recovery upon the bond for damages suffered. The trial court sustained a demurrer to the declaration, and upon appeal this action was affirmed.

The Court of Appeals held that if the Consul-General's failure to perform his official duties concerning the personal property caused loss, the damage was to the estate, and plaintiff, being a mere possible owner of a distributive share, could not recover in his own right—any possible right of action was in the administrator. This we think was clearly right.

The second count of the painfully prolix declaration alleges "that there were left by said decedent certain valuable real property in the Pao Shan District in Shanghai, China, of the value of, to wit, \$5,000.00, which, outstanding in decedent's name in the Land Records of said United States Consulate at Shanghai, China, it was the duty of the said defendant, James Linn Rodgers, to conserve to said decedent's estate; but notwithstanding his said duty in this respect and in utter violation thereof, and in breach of the condition of his said bond and writing obligatory, he, the said defendant, James Linn Rodgers, instructed one E. H. Dunning to convey and transfer the same over to a certain Mrs. Green, gratuitously, and without any consideration passing therefor, four days after he had illegally and improperly granted alleged letters testamentary to the said E. H. Dunning . . . that no such real estate was devised or sought to be devised under the paper writing hereinbefore referred to as the pretended last will and testament of the said Henry H. Cunningham, deceased . . . and said

assumption of a jurisdiction and power to so instruct the said E. H. Dunning, was wholly illegal and void, although having the effect of dissipating a valuable part of plaintiff's deceased brother's estate, to the consequent loss of plaintiff by this, said defendant James Linn Rodgers' violation and breach of the condition of his bond and writing obligatory, so as aforesaid given to insure plaintiff all legal and proper protection of his said interests in and to his deceased brother's estate, as aforesaid."

The plaintiff's whole cause is presented upon the theory that Rodgers had no power to administer the estate of the deceased brother or to do aught in reference thereto but what the statutes authorized; "namely, conserve and transmit to the United States for proper and legal distribution according to the laws of decedent's domicile." No statute is cited which imposes any duty in respect of real estate upon a consul in China. Under such circumstances mere allegation that defendant unlawfully assumed to instruct one holding void letters testamentary to transfer such property without consideration is wholly insufficient to show an actionable breach of official duty, or adequately to point out personal damage suffered by plaintiff in error. Real estate can not be dissipated by mere direction gratuitously to convey it issued without semblance of authority. The judgment below is

Affirmed.